



ENCYCLOPÆDIA  
OF THE  
LAWS OF ENGLAND  
VOLUME VII



AGENTS IN AMERICA	.	.	.	BOSTON BOOK CO.
„ DUBLIN	.	.	.	HODGES, FIGGIS, & CO. LD.
„ CALCUTTA	.	.	.	THACKER, SPINK, & CO.
„ MELBOURNE	.	.	.	C. F. MAXWELL (PARTRIDGE & CO.).
„ SYDNEY	.	.	.	C. F. MAXWELL (HAYES BROTHERS).

PRINTED FOR  
THE PUBLISHERS,  
BY MORRISON AND GIBB LIMITED •  
April 1898.

# ENCYCLOPÆDIA

OF THE

## LAWS OF ENGLAND

BEING A

## NEW ABRIDGMENT

BY THE

*MOST EMINENT LEGAL AUTHORITIES*

UNDER THE GENERAL EDITORSHIP OF

A. WOOD RENTON, M.A., LL.B.

OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME VII

*INTERNATIONAL COPYRIGHT TO  
LODEMANAGE*

LONDON

SWEET & MAXWELL LD.

3 CHANCERY LANE

EDINBURGH

WM. GREEN & SONS

18 AND 20 ST. GILES STREET



The Articles in this Volume have been  
Revised by their respective Authors as at  
*16th March* 1898.

ADDENDUM.

In the list of Principal Articles in Volume VI., insert : *Hinterland*.—T. BARCLAY.



## THE AUTHORS OF THE PRINCIPAL ARTICLES IN THIS VOLUME ARE AS FOLLOWS:—

- |  |  |
|--|--|
| <p><i>International Law</i>.—T. BARCLAY.</p> <p><i>Interpleader</i>.—H. A. DE COLYAR.</p> <p><i>Interpretation</i>.—SIR HOWARD W. ELPHINSTONE, Bart.</p> <p><i>Interrogatories</i>.—E. L. DE HART.</p> <p><i>Intervention</i>.—T. BARCLAY.</p> <p><i>Intoxicating Liquor</i>.—W. W. MACKENZIE.</p> <p><i>Ionian Islands</i>.—T. RALEIGH, Registrar of the Privy Council.</p> <p><i>Ireland</i>.—C. MATURIN.</p> <p><i>Issue</i>.—J. S. HENDERSON.</p> <p><i>Issues</i>.—T. J. BULLEN.</p>  | <p><i>Judicial Separation</i>.—W. DURLEY GRAZEBROOK.</p> <p><i>Judicial Trustee</i>.—A. H. WITHERS.</p> <p><i>Jurisprudence</i>.—PROFESSOR T. E. HOLLAND</p> <p><i>Jury</i>.—A. W. DONALD.</p> <p><i>Jus gentium</i>.—T. BARCLAY.</p> <p><i>Just Allowances</i>.—C. BURNEY, one of the Masters of the Supreme Court of Judicature.</p> <p><i>Justice of the Peace</i>.—W. W. MACKENZIE.</p> <p><i>Justices' Clerk</i>.—W. F. CRAIES.</p> <p><i>Justification</i>.—W. BLAKE ODGERS, Q.C.</p>                    |
| <p><i>Jamaica</i>.—T. RALEIGH, Registrar of the Privy Council.</p> <p><i>Joinder of Causes of Action</i>.—W. BLAKE ODGERS, Q.C.</p> <p><i>Joint-Tenancy</i>.—J. D. ISRAEL.</p> <p><i>Judge Advocate-General</i>; and</p> <p><i>Judge Advocate of the Fleet</i>.—G. H. KNOTT.</p> <p><i>Judge at Chambers</i>.—C. BURNEY, one of the Masters of the Supreme Court of Judicature.</p> <p><i>Judge Ordinary</i>.—W. DIGBY THURNA.</p> <p><i>Judge's Notes</i>.—C. BURNEY, one of the Masters of the Supreme Court of Judicature.</p> <p><i>Judgment</i>.—W. F. CRAIES.</p> <p><i>Judgments Extension</i>.—FRANCIS A. STRINGER, of the Central Office.</p> | <p><i>Knight; Knighthood</i>.—G. H. KNOTT.</p> <p><i>Lancaster, Duchy and County Palatine of</i>.—G. B. M. COORE.</p> <p><i>Land Charges</i>.—J. S. HENDERSON.</p> <p><i>Landlord and Tenant</i>.—E. FOA and T. C. HINDMARSH.</p> <p><i>Lands Clauses Acts</i>.—W. F. CRAIES.</p> <p><i>Land Societies</i>.—E. A. WURTZBURG.</p> <p><i>Land Tax</i>.—W. F. CRAIES.</p> <p><i>Land Transfer</i>.—JOHN M. LIGHTWOOD.</p> <p><i>Larceny</i>.—W. F. CRAIES.</p> <p><i>Law Reporting</i>.—SIR F. POLLOCK, Bart.</p> |

*Law Reports—**Colonial.*—W. F. CRAIES.*Indian.*—T. RALEIGH, Registrar of the  
Privy Council.*Lay Impropiator.*—J. ARTHUR PRICE.*Leakage and Breakage.*—G. G. PHILLIMORE.*Leap Year.*—J. R. M'ILRAITH.*Lease and Release.*—H. W. LAW.*Lease ; Leasehold.*—J. D. ISRAEL.*Leases, Ecclesiastical.*—W. F. CRAIES.*Legacy.*—C. S. JACKSON.*Legal Estate.*—J. D. ISRAEL.*Legitimacy.*—F. W. SHERWOOD.*Letters Patent.*—T. M. STEVENS.*Liberty of the Press.*—W. BLAKE ODGERS, Q.C.*Libraries.*—J. S. HENDERSON.*Licence.*—D. M. KERLY.*Licence (Marriage).*—W. DIGBY THURNAM.*Licensing.*—W. W. MACKENZIE and H. WOOD-  
COCK.*Lien.*—J. D. ISRAEL.*Life Insurance.*—J. V. VESEY FITZGERARD,  
Q.C.*Life, Estates for.*—J. D. ISRAEL.*Life Peerage.*—F. P. WALLIS.*Light.*—J. LEYBOURN GODDARD.*Lighthouse.*—G. G. PHILLIMORE.*Light Locomotives ; and**Light Railways.*—EVANS AUSTIN.*Limitation ; Limitations (Statutes of).*—J. R. V.  
MARCHANT.*Limitation of Liability.*—G. G. PHILLIMORE.*Limitation, Words of.*—C. S. JACKSON.*Lis pendens.*—E. A. WURTZBURG.*Livery Stable.*—C. E. LLOYD.*Lloyd's.*—G. G. PHILLIMORE.*Local Act.*—PAUL STRICKLAND.*Local Government ; and**Local Government Board.*—W. BLAKE ODGERS,  
Q.C.



# ENCYCLOPÆDIA

## THE LAWS OF ENGLAND

**International Copyright.**—See BERNE CONVENTION; COPY-RIGHT.

### International Law.

#### TABLE OF CONTENTS.

1. DEFINITION AND SCOPE . . .	1	5. POSITION OF UNCIVILISED RACES . . .	13
2. HISTORICAL DEVELOPMENT . . .	4	6. CODIFICATION . . .	13
3. SOURCES OF INTERNATIONAL LAW . . .	7	7. INTERNATIONAL MORALITY . . .	13
4. DIVISIONS AND PRINCIPLES OF INTERNATIONAL LAW . . .	11	8. BIBLIOGRAPHY . . .	14

#### 1. DEFINITION AND SCOPE.

French, *Droit des gens*; German, *Völkerrecht*. Zouch entitled one of his treatises, *De judicio inter gentes*; Selden speaks in his preface to *Mare Clausum* of *jus inter gentes*, though on the title-page he cites the authority of the *jus naturæ seu gentium*. The older English term is Law of Nations, which, like *Droit des gens*, is a literal rendering of *jus gentium* (*q.v.*). The more precise term, International Law, is supposed to have been first used by Bentham (*Morals and Legislation*, Oxford, 1879, p. 326).

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent States, and the individuals belonging to each (*Blackstone, Commentaries on the Laws of England*, 4th ed., vol. iv. p. 66).

English law recognises the existence of international law; our Courts seem to apply or enforce it sometimes as a common and more or less immemorial usage; at others, as an informal agreement between nations by which we, as a nation and consenting parties, are bound, and again at others as both.

The following passage of Lord Coleridge's judgment in the *Franconia* case (*q.v.*) is an instance of the last or mixed view:—

Strictly speaking, "International law" is an inexact expression, and it is apt to mislead, if its inexactness is not kept in mind. Law implies a lawgiver and a tribunal



capable of enforcing it and coercing its transgressors, but there is no common lawgiver to sovereign States; and no tribunal has the power to bind them by decrees or to coerce them if they transgress. The law of nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and Acts of States are but evidence of the agreement of nations, and do not, in this country at least, *per se* bind the tribunals. Neither, certainly, does a *consensus* of jurists; but it is evidence of the agreement of nations on international points; and on such points when they arise, the English Courts give effect as part of English law to such agreement (2 Ex. D. 63).

Lord Salisbury, whose authority is great, has less respect for the "*consensus* of jurists." In a speech on the establishment of a Court of International Arbitration, in 1887, he observed:—

International law has not any existence in the sense in which the term "law" is usually understood. It depends generally upon the *prejudices of writers of text-books*. It can be enforced by no tribunal, and therefore to apply to it the phrase "law" is to some extent misleading (*Times*, July 26, 1887).

The present Lord Chief Justice, on the other hand, in his speech to the American Bar at Saratoga Springs, N. Y., in 1896, speaking of the view that international law was only a bundle of rules more or less confused, to which nations more or less conformed, holds that—

The view expressed by Lord Coleridge is based on too narrow a definition of law, a definition which relies too much on force as the governing idea. . . . If the development of law is historically considered, it will be found to exclude that body of customary law which in early stages of society precede law. As government becomes more frankly democratic, laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. . . . I claim that the aggregate of the rules to which nations have agreed to conform in their conduct towards one another, are properly to be designated International Law (see *Law Quarterly Review*, October 1896).

We may also cite here the view of Sir F. Pollock, as a theoretical jurist:—

The rules observed, or generally expected so to be, by the Governments of civilised independent States in their dealings with one another and with one another's subjects are called the Law of Nations, or International Law. We are not called upon to consider here whether they are more nearly analogous to the law administered by Courts of justice within a State, or to purely moral rules, or to those customs and observances in an imperfectly organised society which have not fully acquired the character of law, but are on the way to become law. This last mentioned opinion is my own (*A First Book of Jurisprudence*, London, 1896, p. 13).

Incidentally we may mention two Acts of Parliament which refer to the "law of nations" and international law as recognised or ascertainable.

In the Act of 7 Anne, c. 12, relating to the privileges of ambassadors, the form used is "be it therefore declared," and not "enacted," implying that the usage referred to was already a part of the law of England. The preamble states that certain "turbulent and disorderly persons having, in a most outrageous manner, insulted the person of his excellency, . . . in contempt of the protection granted by Her Majesty, *contrary to the law of nations* and in prejudice of the rights and privileges which ambassadors and other public ministers authorised and received as such, *have at all times been hereby possessed of*, and ought to be kept sacred and inviolable," etc.

Another reference to international law occurs in the Foreign Marriage Act (55 & 56 Vict. c. 23), sec. 19 of which provides that "a marriage officer shall not be required to solemnise a marriage or to allow a marriage to be solemnised in his presence, if, in his opinion the solemnisation thereof would be *inconsistent with international law* or the comity of nations." The

Legislature probably meant that nothing must be done which would be contrary to the rules of extraterritoriality recognised by international law.

The only secondary position grudgingly allowed by most English lawyers to international law as a branch of law, is due to Austin's definition. Laws proper, or properly so-called, says Austin, are commands; laws which are not commands, or laws improper, are improperly so-called. A command implies a definite superior in a position to enforce the command. Where there is no superior to impose obedience there is no law. Rules which "are imposed among nations or sovereigns by opinions current amongst nations, are usually styled the law of nations or international law. Now a law set or imposed by public opinion is a law improperly so-called" (*The Province of Jurisprudence Determined*, p. 147).

Many English lawyers bred in this school would assimilate international law to the so-called "Code of Honour," or a sort of club rules binding on members only. Sir H. Maine, writing on the implication that a rule, the observance of which is not enforceable by a legal sanction, is not a law, and therefore has no claim to be obeyed, says:—

Austin has shown, though not without some straining of language, that the sanction is found everywhere in positive law, civil and criminal. This is, in fact, the great feat which he performed, but some of his disciples seem to me to draw the inference from his language that men always obey rules from fear of punishment. As a matter of fact this is quite untrue, for the largest number of rules which men obey are obeyed unconsciously from a mere habit of mind. Men do sometimes obey rules for fear of the punishment which will be inflicted if they are violated, but, compared with the mass of men in each community, this class is but small; probably it is substantially confined to what are called the criminal classes, and for one man who refrains from stealing or murdering because he fears the penalty, there must be hundreds or thousands who refrain without a thought on the subject (*International Law*, p. 50).

Elsewhere the same writer remarks:—

What we have to notice is that the founders of international law, though they did not create a sanction, created a law-abiding sentiment. They diffused among sovereigns, and the literate classes in communities, a strong repugnance to the neglect or breach of certain rules regulating the relations and actions of States (*ibid.* p. 51).

Lord Salisbury's stricture on the opinions or, as he calls them "prejudices" of the jurists may in many instances be justified, but to borrow again from Sir H. Maine—

It does not do to look too far back into the origins of law for the reasons of its establishment. Much of the beginnings of English law is to be found in the year-books; but it would not be too harsh to say that some of the reasons given for rules now received, which are to be found in the year-books, are mixed with a great deal of sheer nonsense. The original reasons for the international rules are possibly to some extent nonsense; they often seem to us commonplace, they are often rhetorical . . . (*ibid.* p. 51).

We may, however, safely say that States, like individuals, cannot live alongside each other without evolving rules of conduct by which, in their common interest, friction, discussion, and conflict are avoided. To induce respect for their own rights they recognise those of others. To be able to count on their neighbours they must avoid giving rise to suspicion of themselves. International law is nothing but the practice of these common rules of conduct in regard to juridical relations between States.

It cannot be denied that certain homogeneous rules are obeyed by all civilised States in their intercourse with one another, and that they are enforced as a part of the domestic law by their respective law Courts. As Professor Westlake has justly pointed out, the difference which exists

in the amount of obedience paid to international and national law respectively, "does not seem to deserve the prominence sometimes given to it. The truth is, that much the larger part of the mutual relations of States is carried on with great regularity in accordance with the international law relating to the several matters concerned, and cases which have a contrary appearance are mostly those in which a rule is uncertain or in which the change of a rule is strongly advocated" (*International Law*, p. 7).

By analogy the rules governing the decision of cases in which the principle of applying a foreign law is recognised is called Private International Law (*q.v.*), though there is an essential difference between the rules voluntarily accepted by sovereign States for their guidance and any rules subject to the ordinary sanctions of the domestic law.

## 2. HISTORICAL DEVELOPMENT.

"Law in general," says Montesquieu, "is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another" (*Spirit of Laws*, Nugent's Translation, 1793, p. 5).

The same observations apply to international law. Montesquieu further observes: "All countries have a law of nations, not excepting the Iroquois themselves, though they devour their prisoners; for they send and receive ambassadors, and understand the rights of war and peace. The mischief is, that their law of nations is not founded on true principles" (*ibid.*). Montesquieu does not always give his authorities for his instances, but it is now admitted that there is no universal law of nations, nor a law of nature, as expounded by the Roman jurists, common to all mankind. What is known as International Law to Europeans is properly confined to the usage which has sprung up among European States since the break-up of the Roman Empire and the growth of its fragments into independent States. No intercourse of States as such practically existed so long as the Roman and Parthian Empires divided up the civilised world, and for several centuries after this break-up there was little or no international life. Chivalry, etc., feudal, and religious wars occupied the sovereigns of Western Europe, and Eastern Europe was absorbed by a struggle for existence in which it ultimately succumbed. It was with the fall of Constantinople, the expulsion of the Moors from Spain, and the discovery and conquest of America, that the sovereigns of Europe turned their attention to the arts of peace, that States with a regular government, conscious population, distant provinces, and an ocean-borne trade became aware that it was by peace, and not by war, they could retain and promote their own prosperity and that of their newly won possessions.

As a consequence of this came a demand for law, and several writers turned their attention, as a matter of course, to those general rules of conduct, called in the Roman law the *jus gentium* or *jus nature*, and supposed to be natural and common to all men.\*

Meanwhile, north and south, in the Mediterranean as well as in the northern seas, seafarers had developed bodies of sea-laws for their own use and guidance. Italy, divided into a number of small commonwealths, had long been leading a busy international life, out of which had grown the idea of the State as a definite and corporate entity with a foreign policy, a minute inter-State ceremonial, a balance of power maintained by diplomacy,

the institution of resident embassies, and a more humane practice of war, in a country where it was rather an art than a means of conquest.

When Grotius began the studies which were to bear fruit in his immortal *De jure belli ac pacis*, the veil of the Middle Ages had fallen, precedents existed, and statesmen only needed some systematic guidance, some authority to rely upon, in dealing with the many incidents of a speedily increasing international intercourse. Grotius provided just the exhaustive grouping of *data* and conclusions required. His work, being largely based on religion and morals, satisfied the then-thinking world. It appealed also to the lawyers as the work of a man well versed in Roman law at a time when admiration for Roman law was at its height.

The vicissitudes of a civil war in his own country, and the earlier stages of the Thirty Years' War, were present in all men's minds when Grotius wrote in the *prolegomena* that he "observed throughout the Christian world a licence in making war which barbarous nations would be ashamed of; a running to arms upon every frivolous, or rather no, occasion; arms being once taken up, there remained no longer any reverence for law either Divine or human, just as if some fury were sent forth with a general licence for all manner of wickedness."

He discerned the total want of science, both in ancient and modern times, in the methods pursued to obtain a knowledge of the duties of nations. "He therefore resolved," says Mr. Ward, "to give his labours to the improvement, or rather to the invention, of a code of laws which might go to the bottom of things and supply authorities, where authorities were wanting, to almost every case in the conduct of nations which could happen" (Ward, *Law of Nations*, vol. ii. p. 616). In order to get at some certain fixed principles which should be acknowledged as such by all who read them, he was obliged "to survey all the codes of morality and of general law which had ever been known; he penetrated into all the sciences between which and his own he could discover any analogy; and he examined the opinions of all great men of whatsoever class from which he could extract anything like a community of sentiment. . . . The work of Grotius, therefore, has for its support all that the philosophers, the poets, the orators, and the critics of antiquity or of modern times can furnish. It is aided by all the lights which can be drawn from the famous civil and canon laws, cleared from its defects and the false glosses which had been put upon it by corrupt or ignorant interpreters" (*ibid.* p. 619).

It was a great point gained for International Law that Grotius understood "the law of nations" to be a system established by the common consent of nations, and distinguished it from the "law of nature," which he expounded only incidentally.

With the close of the Thirty Years' War and the peace of Westphalia Europe assumed more or less its present divisions. This peace was the first great international settlement by treaty, the first great act of diplomacy, the foundation of that community of nations and that balancing of their power which has remained down to our own times a principle in the common polity of Europe.

From the time of Grotius to that of Puffendorff, the next great writer on international law, little was written, Hobbes, Selden, and Zouch being all three practically contemporaries of Grotius.

Hobbes, following a different system from Grotius, instituted a plausible division of the law of nature into that of men, and that of States. "The maxims," he says, "of these laws are precisely the same; but as States once established assume personal properties, that which is termed the

natural law when we speak of the duties of individuals, is called the law of nations when applied to whole nations or States."

Puffendorff (1632-1694), who adopted Hobbes' division (*Law of Nature and Nations*, Book II. ch. iii. s. 23), did not treat separately of the law of nations, but, combining it with the law of nature, passed from the discussion of the rules, governing individuals in their life alongside each other, to groups of individuals forming civil societies, and thence to dealings between these groups, sovereignty, and treaties, "the natural order" requiring that after having treated of "simple or primitive societies we shall now treat of the political body or State, which is regarded as the most perfect of all societies" (VII. ch. i.). This law of the State and of States, however, was only a part of the general law governing all mankind, and he made no attempt to ascertain the rules which in practice States actually observe.

The influence of Puffendorff, the most acute legal dialectician of his time, was immense, and one of the consequences of his work was to retard the development of a theoretical international law, as initiated by Grotius and others, until the middle of the following century. The principal works dealing with international law which appeared in the interval were based on Puffendorff, and are chiefly German.

Out of the practice of States in their intercourse with each other, especially that of maritime States, was gradually growing a customary law of the sea and a body of ceremonial and diplomatic usage; the latter chiefly evolved out of the many competing interests of the numerous German principalities, the inter-recognition of whose independence was one of the consequences of the Thirty Years' War. This ceremonial and usage, it is true, became pedantic and pettifogging, and though it and the "never-ending congresses" may have done little to advance law, they probably conducted much to the preservation of peace.

The decisions of congresses, the rise of newspapers, the publication of memoirs recording in detail public transactions and events, gradually afforded materials which enabled writers to form more accurate impressions of the rules by which States were really and practically governed in their transactions with each other. The next step in the development of international law was, therefore, to collect these materials together.

The first such collection was begun in 1690 by one Daniel von Nessel, an imperial librarian at Vienna, who died before it was finished (Reddie, *International Law*, p. 62). A few years later (1693) Leibnitz (1646-1716) published a better-known work of the same character which he called *Codex juris gentium diplomaticus*, a second enlarged edition of which was issued in 1700, under the title of *Mantissa codicis juris gentium diplomatici*. It contains many interesting documents of the eleventh to the sixteenth centuries.

In his preface, Leibnitz explains his understanding of international law as natural law, modified according to time and local circumstances, established by the tacit consent of nations, and ascertainable from the usage and treaties of nations.

Following upon Leibnitz came another great practical writer, who, making no attempt to deal with the whole subject-matter of international law, brought a master mind to bear on several branches of it. This was Bynkershoek (1673-1743), a jurist whose authority was long great in England. He derived the law of nations from "reason and usage," usage as evidenced by the practice of nations in treaties and ordinances. "If," he says, "all men . . . make use of their reason, it must counsel and command them certain things which they ought to observe as if by mutual

consent, and which, being afterwards established by usage, impose upon nations a reciprocal obligation; without which law, we can neither conceive of war, nor peace, nor alliances, nor embassies, nor commerce" (*De foro legatorum*, c. 3, s. 10).

The next great jurist who helped forward international law generally, and to whom in fact it owes, through Vattel, its present independent position as a branch of the law, was Wolff (1679–1754).

Like Grotius, he detached the law of nations from the law of nature; but moulding the former into a system, he rendered it possible to classify facts and precedents according to the principles they illustrated, and henceforth international law became a subject of independent inquiry. Vattel (1714–1767), in his preface, acknowledges what he owes to Wolff, whom he followed not only in the theory, but even in the arrangement of his work. In fact, as an English writer has said, Vattel's greatest service to the law of nations consisted in his having clothed in a natural, easy, and agreeable dress propositions which Wolff had delivered in a dry, mathematical style (Reddie, *International Law*, p. 76).

With Vattel the period of the foundation of international law came to an end, and the subject has since then been developed by commentators, European congresses, and precedents.

In later times the study of international law generally was less cultivated in England than on the Continent, though maritime law obtained at the hands of our great judge, Sir William Scott (afterwards Lord Stowell), during the wars at the end of the last and beginning of the present centuries, a philosophical groundwork and precision to which its present foremost position as a well-defined branch of international law is in no small measure due. The existence of a body of general principles in the Roman law, or in the codes which most Continental States now possess, and to which practice can always look for guidance, has made it easier for the Continental jurist to bring his mind to the connection of concrete cases with abstract propositions. Our mode of close discrimination among precedents, on the contrary, promotes distrust of anything in the nature of an abstract proposition. Though philosophers like Rutherford and Ferguson had written on the law of nature, and several distinguished lawyers had dealt with questions of maritime warfare and neutrality, it is a fact that in our own time, until Mr. Manning published his short volume of *Commentaries on the Law of Nations* (1839), the only two systematic books on the subject in the English language were by Americans (Kent and Wheaton). Since then several important English treatises have been written, and there are signs of a reviving interest in international law among our greater contemporary lawyers (*vide supra*).

### 3. SOURCES OF INTERNATIONAL LAW.

Wheaton has divided the sources of International Law into the following groups, which it would be difficult to improve upon:—

- Text writers of authority as witnesses of usage;
- Treaties of peace, alliance, and commerce;
- Ordinances of particular States prescribing rules for the conduct of their commissioned cruisers and prize tribunals;
- Adjudications of international tribunals;
- Written opinions of official jurists given confidentially to their own government;

History of the wars, negotiations, treaties, and other transactions relating to the public intercourse of nations (*Elements*, London, 1855, pp. 22 *et seq.*).

These sources are not all of equal value. They must be taken according to circumstances as evidence of a recognised usage; together they may establish the existence of the *consensus gentium* which constitutes international law.

Wheaton does not speak of those abstract principles, the reason of the thing, which are the ultimate foundation of usage. "The use and practice of nations may intervene," it is true, and shift a matter from its foundation (per Lord Stowell, *The Henrick and Maria* case (4 Rob. Adm. R. 54)), but again this use and practice is constantly undergoing change through the varying influence of the current moral doctrines of each successive period. Nor does Wheaton mention the natural attraction of past decisions where there is doubt and uncertainty, of precedents putting upon other shoulders (which have borne the burden before) a part of the responsibility of deciding.

Nor could he mention a powerful agent which has grown up since his time, a sort of forum in which international law itself is weighed and tried, and through which the shifting tendency is counteracted by the concurrent action of all the great living writers and authorities on international law. The work of the Institute of International Law (*q.v.*) is gradually producing a *codex juris inter gentes*, founded on reason, from which statesmen and diplomatists will be able to borrow authoritative arguments in favour of that justice between nations, which the clamour of an ignorant public opinion seems at times to make enlightened men hesitate to respect.

Lord Stowell has endeavoured to show the inter-connection of the "usage and practice of nations" and principles from another standpoint.

"A great part of the law of nations" he said, "stands on no other foundation than this 'usage and practice'; it is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go farther, and to say that mere general speculations would bear you out in a further progress:—thus, for instance, on mere general principles it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventioned law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes" (*The Flad Oyen*, Jan. 16, 1799, 1 Rob. 139).

Two attempts have recently been made by the United States Government to introduce new principles into international law. In the *Behring Sea Arbitration* (*q.v.*) it alleged a proprietary right to seal herds on the high sea. It is quite within reason that such a proprietary right may be claimable at some future time, if a seal herd should ever become as distinguishable and subject to control as a herd of cattle. The other claim, called the *Monroe Doctrine* (*q.v.*), though it may be based on the right of self-preservation on which much of the doctrine of international law is based, is obviously a unilateral policy and one not belonging to the domain of law.

1. *Text-writers of Authority*.—Of this source, Wheaton observes that the text-writers show what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent. "Without wishing to exaggerate the importance of these writers, or to substitute in any case their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilised nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year

it passes without the rules laid down in their works being impugned by the avowal of contrary principles."

Kent (Lecture I. p. 2) asserts that "no civilised nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law."

A famous instance of a case in which a principle, at first advocated by a text-writer, has since become universally adopted is Bynkershoek's limitation of territorial waters to the cannonshot range (see TERRITORIAL WATERS).

2. *Treaties of Peace, Alliance, and Commerce*, declaring, modifying, or defining the pre-existing international law. Though a treaty is only binding as between the parties to it, it bears witness to the facts which led to it, the difficulties it dealt with, and the solution it gave to them, and is therefore, when not merely imposed by a strong upon a weak State, a most valuable and influential precedent in the intercourse of nations.

A number of treaties and declarations in connection with treaties and treaty negotiations, moreover, have from time to time laid down rules either declaratory of international law or for the regulation of the future relations of the parties between themselves.

Thus we see the doctrine of the balance of power laid down, as a rule thenceforth to govern the relations of the States of Europe, in the Treaty of Utrecht (1713), which expressly stated that its object was *ad conservandum in Europâ equilibrium*.

Later on, a vague design of making something like a "permanent contribution" to the law of nations seems to have floated before the minds of the three great sovereigns who entered, in 1816, into the convention commonly known as the Holy Alliance (Lorimer, i. p. 56). This design took form in a protocol signed at Aix-la-Chapelle, November 15, 1818, on behalf of Austria, France, Great Britain, Prussia, and Russia, in which it was declared "that if, for the better attaining the objects of the alliance, the Powers which have concurred in the present act should judge it necessary to establish particular meetings, either of the sovereigns themselves or of their respective ministers and plenipotentiaries, there to treat in common of their own interests, in so far as they have reference to the object of their present deliberations, the time and place of these meetings shall, on each occasion, be previously fixed by means of diplomatic communications; and that in the case of these meetings having for their object affairs specially connected with the interests of the other States of Europe, they shall only take place in pursuance of a formal invitation on the part of such of those States as the said affairs may concern, and under the express reservation of their right of direct participation therein, either directly or by their plenipotentiaries" (*Annual Register*, 1819, pp. 131, 132).

The Congress of Vienna (1815) fixed rules now universally adopted as to diplomatic precedence (see DIPLOMATIC AGENTS).

The articles of the Declaration of Paris (*q.v.*), signed 1856, fixed some important points of international maritime law, which have been recognised by nearly all European States.

The provisions of the Treaty of Washington (May 8, 1871), between Great Britain and the United States, dealt with the duties of neutrals in naval warfare (see ALABAMA CASE), but under reservations on the part of Great Britain.

Lastly, the general Act of Berlin (1886) laid down the rules which are henceforth to govern the occupation of territory (*q.v.*) in the parts of Africa dealt with (see also HINTERLAND and SPHERES OF INFLUENCE).



Even such diplomatic declarations as that of the Black Sea Conference of 1871, that no Power can liberate itself from treaty engagements except with the consent of the other contracting Power, though of no practical value as matters of international law, are useful if only as a public reprobation of bad faith.

"Treaties," says Mr. Hall, "differ only from other evidences of national opinion in that their true character can generally be better appreciated; they are strong concrete facts, easily seized and easily understood. They are, therefore, of the greatest use as marking points in the movement of thought" (*International Law*, p. 12). It is submitted that this very fact is just a reason for giving them a first place among the sources of international law.

3. *Ordinances of particular States prescribing Rules for the Conduct of their Commissioned Cruisers and Prize Tribunals.* (See CAPTURE; CONTRABAND OF WAR; NEUTRALITY; PRIZE.)

4. *Adjudications of International Tribunals*, such as "boards of arbitration" and Prize Courts. Greater weight is attributable, Wheaton points out, to judgments of mixed tribunals, appointed by the joint consent of the nations between whom they are to decide, than to those of Admiralty Courts dependent on the instructions of one nation only.

A case of arbitration which furthered the elucidation of the international law of occupation was that known as the *Delagoa Bay* case. The dispute related to territory claimed by Great Britain as actual occupant, on the ground that the original occupants, the Portuguese, had abandoned it. The decision of the then President of the French Republic, Marshal MacMahon, was practically that the temporary interruption of a long-continued antecedent possession does not amount to a cessation of occupation, and make the territory so temporarily abandoned again *territorium nullius*.

As regards the decisions of Prize Courts, Lord Stowell, in the *Maria* case, a question involving Swedish neutral rights which had come into conflict with those of Great Britain as a belligerent, observed:—"It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden as a neutral country which he would not admit to belong to Great Britain in the same character" (Rob. Rep. i. 340).

It was in a British Prize Court that the doctrine of continuous voyages was devised by this great judge to meet an endeavour by neutral ships to avoid capture by breaking the voyage to an enemy's port at some intervening neutral one.

5. *Written Opinions of Official Jurists given confidentially to their own Governments.*—Of these Wheaton wrote:—

Before one State requires redress from another for injuries sustained by itself or its subjects, it generally acts as an individual would do in a similar situation. It consults its legal advisers, and is guided by their opinion as to the law of the case. Where that opinion has been adverse to the sovereign client, and has been acted on, and the State which submitted to be bound by it was more powerful than its opponent in the dispute, we may confidently assume that the law of nations, such as it was then supposed to be, has been correctly laid down. The archives of the department of foreign affairs of every country contain a collection of such documents, the publication of which would form a valuable addition to the existing materials of international law (*Elements*, p. 25).

Since then the United States has published, under the editorship of

Mr. Francis Wharton, a classified analysis of such opinions in three large volumes, under the title of *Digest of the International Law of the United States* (Washington, 1886).

The English blue-books dealing with foreign relations frequently contain views of the British Government traceable to the same source.

6. *History of Wars, Negotiations, Treaties, and other Transactions relating to the Public Intercourse of Nations*.—Under this heading must be classed the official protocols of conferences and congresses held in view of international arrangements.

We may say, in conclusion, with Lord Chief Justice Russell as to the sources of international law that it is not "a closed book. Mankind are not stationary. Gradual change and gradual growth of opinion are silently going on. Opinions, doctrines, usages advocated by acute thinkers are making their way in the world of thought."

#### 4. DIVISIONS AND PRINCIPLES OF INTERNATIONAL LAW.

Grotius' great book is called the law of war and peace. It is primarily a treatise on the law of war. "But," observes the author, "as war is made with a view to having peace, and there is no disagreement which may not cause war, it will not be out of place to treat, in connection with the law of war, of all ordinary disputes: whereafter war will lead us to peace as to its end and object" (I. i.). Puffendorff, on the other hand, followed the natural divisions of private law, arrived in Books VII and VIII. at the constitution of civil society as a development of that private law, and treated in Book VIII. of sovereignty and its attributes, the relationship of a State to its subjects, of war, treaties, etc. Wolff, after treating of morals generally, and then of private rights and obligations, reaches, in sec. 2 of Part 3 of his book, the principles of public law, and, in Part 4, the law of nations. Vattel, with some changes in the order, borrowed Wolff's divisions, his *Droit des Gens* being split up into general principles, the internal obligations of nations, their external obligations, war and peace, and embassies.

So long as the subject was entitled *droit des gens*, or "Law of Nations," it warranted the inclusion, as belonging to the subject, of the internal conditions of States. The term "international law," on the other hand, excludes all that is not *inter gentes*; and since Vattel's time this more precise description of the subject has brought about a corresponding delimitation of the matters it comprises. Thus authors, like Sir Travers Twiss, treating the subject of international law as confined to the rights and duties of States in war and in peace, group its matter necessarily into a series of rights and their relative obligations—the rights of self-preservation, of acquisition, of possession, of jurisdiction, of the sea, of legation, and of treaty. This system has been followed, with variations, in several works, among which are Mr. Ferguson's exhaustive treatise and Mr. Lawrence's excellent little book (see *infra*, BIBLIOGRAPHY).

Professor Holland, in a short but luminous chapter of his *Jurisprudence* (Oxford, 8th ed., 1896, p. 348), expounds the view that the law of nations is but private law "writ large." (This recalls Hobbes, see *supra*.)

It is an application to political communities of those legal ideas which were originally applied to the relations of individuals. Its leading distinctions are, therefore, naturally those with which private law has long ago rendered us familiar. In international as in private law, we are concerned with the persons for whose sake rights are recognised; with the rights thus recognised; and with the protection by which those rights are made effective. We have a law of persons; a Substantive law which sets forth and explains the rights of those persons; and an Adjective law which describes the procedure by which redress is to be obtained when those rights are violated.

This is perfect ; but Professor Holland goes on to say of his last division : " This last-mentioned department is subdivided into the law which regulates the relations of belligerents to one another, and the law which regulates the relations of each belligerent with States which take no part in the war " (p. 348).

This does not, however, cover all the procedure of redress. The third branch of Professor Holland's fourfold division of international law into status, peace, belligerency, and neutrality (p. 349) requires completion by the addition of a division to include the settlement of disputes without war. Following Professor Holland, with this modification, we therefore divide international law into (1) status, (2) peace, (3) settlement of disputes without war, (4) belligerency, (5) neutrality.

*International Status.*—The only persons, strictly speaking, known to international law are States. Some writers speak of " subjects " of international law, and group together as such : States, associations of States, reigning sovereigns and their families, and diplomatic agents ; but it is difficult to see what useful purpose is served by such a confusion of principal and agent.

States, on the analogy of the individual persons who make up a community, are supposed to form a community of nations. They are not all of equal rank. The chief Christian nations—Great Britain, France, Germany, Austria-Hungary, Russia, Italy (and, where they have an interest, the United States of North America)—are great Powers, and form a sort of areopagus, at present and for certain purposes, called the Concert of Europe (*q.v.*). Other Christian States of Europe and of America are admitted to a position of equality in all things not connected with the settlement of the map of Europe ; and there is a third class of States, not yet admitted to equality, whose territorial sovereignty is subject to certain restrictions (see EXTRATERRITORIAL JURISDICTION). Among these, by a curious contradiction, is the Ottoman Empire (see CAPITULATIONS), which was nevertheless admitted in 1856 into the European Concert. Protected States (see PROTECTORATES) are not persons in international law.

Internal changes of government do not deprive a State of its personality (see SOVEREIGNTY ; STATE).

*Peace.*—The state of peace between members of the community of nations involves a large number of the conditions incidental to the intercourse of individuals, such as ownership, contract, agency, partnership, etc. It also involves a principle which has no place in national law, but which in international law passes before all others—the principle that every nation is entitled to ensure its own preservation and independence, even at the expense of obligations incurred towards other States, the duty of a State in relation to its subjects taking precedence in a general way over that towards foreign States.

Under what is called in international law, dominion, fall the delicate questions of occupation of territory (*q.v.*) (see also HINTERLAND), territorial waters (*q.v.*), freedom of the sea (*q.v.*), and *mare clausum* (*q.v.*) (see also BEHRING SEA QUESTION); under contract: treaties (*q.v.*), congress (*q.v.*), conference (*q.v.*); under agency: diplomatic agents (*q.v.*) (see also AMBASSADOR and EXTRATERRITORIALITY); under partnership: international unions (*q.v.*); and so on.

*Settlement of Disputes without War.*—This comprises all the methods of settling disputes, remedying wrongs, and enforcing rights without recourse to war (see ARBITRATION ; BLOCKADE (PACIFIC) ; EMBARGO ; INTERVENTION ; MEDIATION).

*Belligerency* is the state of war (see BELLIGERENT; BLOCKADE; COMBATANT; DECLARATION OF WAR; ENEMY; PRIZE; WAR).

*Neutrality* embraces the conditions which war creates for those who are not parties to it (see BLOCKADE; CONTRABAND OF WAR; NEUTRALITY).

#### 5. POSITION OF UNCIVILISED RACES.

International law, we have seen, assumes, as between the nations who give force to it, the same level, more or less, of civilisation. Rights and obligations are correlative, and a reciprocal understanding and acknowledgment constitutes that practical equality which is recognised among Christian States as a principle of their intercourse. Uncivilised races cannot be treated as equals. Their Governments are treated as local; they are annexed to the dominions of civilised States without reference to their will or consent; and where treaties have been made with natives, any appeal to them has been rather by way of evidence of prior occupation than as involving any question of native right.

Some laws and international measures, such as the General Act of Brussels, 1890, have dealt with, and philanthropists have raised and still raise their voices in, the cause of the natives (see ABORIGINES, PROTECTION OF); and at the Berlin Conference in 1878 an attempt was made by the United States representative, Mr. Kasson, to apply international law to native races in so far as regarded "recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory." In conformity with this principle the American Government, he said, would have gladly adhered "to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression" (Protocol of 31st Jan. 1885, Parl. Papers, C. 4361, p. 209). This suggestion, however, was not acted upon, and the Conference confined itself to establishing rules for the occupation of Africa by Europeans.

#### 6. CODIFICATION.

Several writers have set forth the principles of international law in the form of a Code. The best known are Bluntschli's *Codified Law of Nations*, 1868; David Dudley Field's *Draft Outlines of an International Code*, 1872-3; and Fiore's *International Law Codified*, 1890. The Association for the Reform and Codification of the Law of Nations (*q.v.*)—now International Law Association—and the Institute of International Law (*q.v.*) have both had codification in view, and the latter has published a volume which, for the subjects it deals with, is a valuable contribution towards that object. The idea is that States should jointly fix the principles on which they are agreed; and there is no reason to suppose that what has been possible for copyright (see BERNE CONVENTION), industrial property, etc. (see INTERNATIONAL UNIONS), and maritime law (see DECLARATION OF PARIS), is not susceptible, eventually, of greater extension.

The frequent congresses for the joint regulation of international relations, the treaties of neutralisation and guarantee which place certain States beyond the range of war, the rise of international unions (*q.v.*), the common rules for the government of armies in the field (see BELLIGERENT), etc., attest that States have come, as fully as individuals, to perceive that their ultimate interests are the same, and that the reign of law among them is the greatest safeguard of the happiness of the populations committed to their care.

## 7. INTERNATIONAL MORALITY AS DISTINGUISHED FROM INTERNATIONAL LAW.

Sir F. Pollock draws a distinction between international law and morality which deserves notice:—

International law is a true branch of jurisprudence, notwithstanding all that may be said about its want of sovereign power and a tribunal. You may define it as "positive international morality," not having the nature of true law; but if you do, the facts are against you. For what are the facts? 1. The doctrines of international law are founded on legal, not simply on ethical, ideas. They are not merely prevalent opinions as to what is morally right and proper, but something as closely analogous to civil laws as the nature of the case will admit. They purport to be rules of strict justice, not counsels of perfection. 2. Since they assumed a coherent shape they have been the special study of men of law, and have been discussed by the methods appropriate to jurisprudence, and not by those of moral philosophy. 3. There is also a practical test, and a conclusive one. If international law were only a kind of morality, the framers of State papers concerning foreign policy would throw all their strength on moral argument. But, as a matter of fact, this is not what they do. They appeal not only to the general feeling of moral rightness, but to precedents, to treaties, and to opinions of specialists. They assume the existence among statesmen and publicists of a sense of legal as distinguished from moral obligation in the affairs of nations. 4. Further, there is actually an international morality, distinct from and compatible with international law in the usual sense. As a citizen among citizens, so a nation among nations may do things which are discourteous, high-handed, savouring of sharp practice, or otherwise invidious and disliked, and yet within its admitted right, and giving no formal ground of complaint. There is a margin of discretionary behaviour which is the province not of claims and despatches, but of "friendly representations" and "good offices" (*Oxford Lectures and other Discourses*, London, 1890).

## 8. BIBLIOGRAPHY.

(This Bibliography does not profess to be complete, but it is hoped that, grouped according to the language of the writers, it will be found useful.)

(For Collections of Treaties, see TREATIES; and for other subjects, under their respective headings.)

## EARLY WRITERS.

- Ayala, *De jure et officiis bellicis et disciplina militari*. Libri Tres, Douai, 1582.  
 Suarez, *Tractatus de legibus ac Deo legislatore*, 1679; also see *Opera omnia Moguntiae et Lugduni*, 1630, Venice, 1740.  
 Gentili, *De jure belli commentationes*, Oxford, 1598-89.  
 Grotius, *De jure belli ac pacis*, Paris, 1625; transl. into French by Barbeyrac (*Le droit de la guerre et de la paix*), Amsterdam, 1724; transl. into French by Pradier-Fodéré, Paris, 1867; transl. into English by Wm. Evats, Lond. 1682.  
 Selden, *De jure naturali et gentium secundum disciplinam Hebræorum*, Lond. 1640 *cir.*  
 Hobbes, *De cive*, Lond. 1642-47; *De Corpore politico, or The Elements of Law, Moral and Politick*, Lond. 1684.  
 Zouch, *Juris et judicii feodalis, sive juris inter gentes et questionum de eodem explicatio*, Lond. 1650.  
 Puffendorf, *De jure naturæ et gentium*, 1672; transl. into English by Basil Kennett (*Law of Nature and of Nations*), 1717; transl. into French by Barbeyrac, 1759.  
 Heineccius, *De navibus ob vecturam vetularum mercium commissis*, Halle, 1721.  
 Bynkershoek, *Quæstiones juris publici*, 1737; transl. of the fragment, *De foro legatorum*, by Duponceau, Philadelphia, 1810; a digest of his views on captures in war has been made by R. Lee (*Treatise of Captures in War*, 2nd ed., 1803).  
 Burlamaqui, *Principes du droit naturel et du droit politique*, Geneva, 1748; *Principes du droit de la nature et des gens*, 1766-68.  
 Wolff, *Jus gentium*, Halle, 1749; *Institutiones juris naturæ et gentium*, Halle, 1754.  
 Rutherford, *Institutes of Natural Laws*, Lond. 1754.  
 Vattel, *Le droit des gens*, Neuchâtel and Leyden, 1758; transl. into English (*The Law of Nations*), a new edition with Notes and Index by J. Chitty, Lond. 1834; French edit. Pradier-Fodéré, 1863.  
 Olmedo y Leon, *Elementos del derecho publico*, Madrid, 1771.  
 Moser, *Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegeszeiten vornehmlich aus Staatshandlungen seit 1740*, Frankfurt, 1777-80.  
 Moser (the younger), *Kleine Schriften zur Erläuterung des Staats- und Völkerrechts*, 12 vols. Frankfurt, 1751-65.

Omstedta, *Literatur des gesammten sowohl natürlichen als positiven Völkerrechts*, Ratisbonne, 1755.

## ENGLISH WRITERS.

- Blackstone, *Commentaries on the Laws of England*, 4th ed., Oxford, 1770.  
 Ward, *The Foundation and History of the Law of Nations in Europe to the age of Grotius* Lond. 1795; edit., with preface, by Lord Stanley of Alderley, Lond. 1875.  
 Mackintosh, *Discourse on the Study of the Law of Nature and Nations*, Lond. 1800.  
 Chitty, *Practical Treatise on the Law of Nations*, 1812.  
 Manning, *Commentaries on the Law of Nations*, Lond. 1839; 2nd. ed. by Sheldon Amos, 1875.  
 Reddie, *Inquiries in International Law*, Lond. 1842.  
 Polson, *Principles of the Law of Nations*, Lond. 1848.  
 Wildman, *Institutes of International Law*, Lond. 1849.  
 Levi, *The Law of Nature and Nations as affected by Divine Law*, Lond. 1855.  
 Twiss, *The Law of Nations considered as Independent Communities*, 2 vols., 2nd ed., Lond. 1875-92; *Lectures on the Science of International Law*, Lond. 1856.  
 Historicus (Sir William Harcourt), *Letters on some Questions of International Law*, 1863.  
 Sheldon Amos, *Lectures on International Law*, Lond. 1874.  
 Creasy, *First Platform of International Law*, Lond. 1876.  
 Phillimore, *Commentaries upon International Law*, 4 vols., 3rd ed., Lond. 1879-89.  
 Holland, *The Elements of Jurisprudence*, Lond. 1880; 8th ed., Oxford, 1896.  
 Hosack, *The Rise and Growth of the Law of Nations*, Lond. 1882.  
 Lorimer, *The Institutes of the Law of Nations*, Lond. 1883.  
 Stephen, *International Law and International Relations*, Lond. 1884.  
 Ferguson, *A Manual of International Law*, Lond. 1884.  
 Maine, *International Law*, Lond. 1888, 1890.  
 Pitt Cobbett, *Leading Cases and Opinions on International Law*, 2nd ed., Lond. 1892.  
 Walker, *The Science of International Law*, Lond. 1893.  
 Westlake, *Chapters on the Principles of International Law*, Cambridge, 1894.  
 Lawrence, *The Principles of International Law*, Lond. 1895.  
 Hall, *A Treatise on International Law*, 4th ed., Oxford, 1895.  
 M'Intosh, Story, etc., *Int. Law Tracts*.  
 Lawrence, *Handbook of Public International Law*, 4th ed., Lond. 1898.

## AMERICAN WRITERS.

- Wheaton, *Elements of International Law*, 1st ed., 1836; edit. Lawrence, 1855; edit. Dana, 1866; edit. Boyd, Lond. 1880; *History of the Law of Nations*.  
 Gardner, *A Treatise on International Law*, 1844; *Institutes of International Law*, New York, 1860.  
 Kent, *Commentary on International Law*, edit. Abdy, Lond. 1866.  
 Halleck, *Elements of International Law*, 1874; *International Law*, edit. Sherston Baker, Lond. 1878.  
 Woolsey, *Introduction to the Study of International Law*, 5th ed., New York, 1879.  
 Wharton, *A Digest of the International Law of the United States*, 3 vols., Washington, 1886.  
 Snow, *Cases and Opinions*, Boston, 1893.

## GERMAN WRITERS.

- Martens, C. F., *Præce lineæ juris gentium europæarum practici*, 1785; *Précis du droit des gens moderne de l'Europe*, edit. Vergé, Paris, 1864; *The Law of Nations*, trans. by Wm. Cobbett, Lond. 1829.  
 Saalfeld, *Grundriss eines Systems des europäischen Völkerrechts*, Göttingen, 1809.  
 Schmalz, *Das europäische Völkerrecht*, Berlin, 1817.  
 Schmelzing, *Systematischer Grundriss des praktischen europäischen Völkerrechts*, Rudolstadt, 1818-19.  
 Klüber, *Le droit des gens moderne de l'Europe*, Stuttgart, 1819 (German edition modified, 1821); edit. Ott, Paris, 1874.  
 Martens, C., *Causes célèbres du droit des gens*, Leipzig, 1827; new edit., 1843.  
 Saalfeld, *Handbuch des positiven Völkerrechts*, Tübingen, 1833.  
 Oppenheim, *System des Völkerrechts*, Frankfort, 1845.  
 Kaltenborn, *Critik des Völkerrechts*, Leipzig, 1847; *Zur Geschichte der Natur und Völkerrechts*, Leipzig, 1848.  
 Heffter, *Das europäische Völkerrecht der Gegenwart*, Berlin, 1855; transl. into French by Bergson (*Le droit international de l'Europe*), 4th ed. enlarged and annotated by Geffcken, Berlin and Paris, 1883.

- Neumann, *Grundriss des heutigen europäischen Völkerrechts*, Vienna, 1856; 3rd 1885; transl. into French by Riedmatten (*Éléments du droit des gens Européen*), Paris, 1885.
- Geffcken (see Heffter).
- Mohl, *Encyclopädie der Staatswissenschaften, Staatsrecht, Völkerrecht und Politik*, 1860-69.
- Holtzendorff, *Rechtslexikon*, Leipzig, 1870.
- Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, Nördlingen, 1868; transl. into French by Lardy (*Le droit international codifié*), Paris, 2nd ed., 1874; *Die Bedeutung und die Fortschritte des modernen Völkerrechts*, 2nd ed., Berlin, 1873.
- Quaritsch, *Compendium der europäischen Völkerrechts*, Berlin, 1873.
- Roebel, *Dissertationes de jure naturæ et gentium*, Kiel, 1876.
- Bergbohm, *Staats Verträge und Gesetze als Quellen des Völkerrechts*, Leipzig, 1877.
- Perels, *Das internationale Seerecht der Gegenwart*, Berlin, 1882; transl. Arendt (*Manuel de droit maritime international*), Paris, 1884.
- Holtzendorff, *Handbuch des Völkerrechts*, Hamburg, 1887 (4 vols.).
- Hartmann, *Institutionen des praktischen Völkerrechts in Friedenszeiten*, 1887.
- Bruder, *Staatslexikon*, Freiburg, 1889 (5 vols.).

## FRENCH AND BELGIAN WRITERS.

- Rayneval, *Institutions du droit de la nature et des gens*, Paris, 1832.
- Massé, *Le droit commercial dans ses rapports avec le droit des gens*, Paris, 1844-48.
- Cauchy, *Le droit maritime international considéré dans ses origines et ses rapports avec les progrès de la civilisation*, Paris, 1862.
- Hautefeuille, *Histoire des origines, des progrès, et des variations du droit maritime international*, Paris, 1858, 2nd ed., 1869.
- Laurent, *Histoire du droit des gens et des relations internationales*, Bruxelles, 2nd ed., 1861-68.
- Calvo, *Le droit international theorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens*, Paris, 1868, 4th ed., 1888.
- Funck-Brentano et Sorel, *Précis du droit des gens*, Paris, 1877.
- Renault, *Introduction à l'étude du droit international*, Paris, 1879.
- Nys, *Le droit de la guerre et le précurseurs de Grotius*, Paris, 1882.
- Pradier-Fodéré, *Traité de droit international public, Européen et Américain*, 1885.
- Fauchille, *La diplomatie française et la ligue des neutres de 1780 (1776-83)*, Paris, 1893.
- Piédelièvre, *Précis de droit international public ou droit des gens*, Paris, 1894.
- Rivier, *Principes du droit des gens*, Paris, 1896.

## SPANISH WRITERS.

- Pando, *Elementos de derecho internacional*, Madrid, 1843; 2nd ed., 1852.
- Riquelme, *Elementos de derecho publico internacional*, Madrid, 1849.
- Perez-Gomar, *Curso de derecho de gentes*, Montevideo, 1864-66.
- Sanchez, *Elementos de derecho internacional publico*, Madrid, 1866.
- Onezimo, *Discurso sobre la historia del derecho internacional*, Buenos Ayres, 1872.
- Alcorta, *Tratado de derecho internacional*, Buenos Ayres, 1878.
- Bello, *Principios de derecho internacional*, 2nd ed. by Silva, Madrid, 1884.

## ITALIAN WRITERS.

- Fiore, *Trattato di diritto internazionale pubblico*, Milan, 1865; 3rd ed., Torino, 1888; transl. into French by Antoine (*Nouveau droit international public*), Paris, 1885.
- Mancini, *Diritto Internazionale*, Naples, 1873.
- Brusa, *Dell'odierno diritto internazionale pubblico*, Florence, 1876.
- Pierantoni, *Storia del diritto internazionale nel secolo xix.*, Naples, 1877; *Trattato di diritto internazionale*, 1881.

## RUSSIAN WRITERS.

- Martens (F. de), *Les problèmes du droit international moderne*, St. Petersburg, 1871; *Le droit international actuel des peuples civilisés* transl. by Léo (*Traité de droit international*), Paris, 1883.
- Kamarowsky, *Le tribunal international*, transl. into French by Westman, Paris, 1887.

## PORTUGUESE.

- Paiva, *Elementos de direito dos gentes*, Coimbra, 1864.

## DANISH.

- Bornemann, *Forelæsninger over den positive folkeret*, Copenhagen, 1866.

## CODIFIED TREATISES OF INTERNATIONAL LAW.

Paroldo, *Saggio di codificazione del diritto internazionale*, Turin, 1851.

Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (see above).

Dudley Field, *Outlines of an International Code*, New York, 1872.

Fiore, *Le droit international codifié*, transl. into French by A. Chrétien, Paris, 1890.

Bulmerincq, *Praxis, Theorie, und Codification des Völkerrechts*, Leipzig, 1874.

Lueder, *Der neueste Codificationsversuch auf dem Gebiete des Völkerrechts*, 1874.

**International Law Association.**—See vol. i. p. 364.

**International Law, Private.**—This subject, as pointed out in the article on INTERNATIONAL LAW, is by analogy often classed and dealt with as a part of international law, but there is really only an apparent connection between them. The subject will be found under its proper heading—PRIVATE INTERNATIONAL LAW.

**International Rivers.**—See RIVERS (INTERNATIONAL).

**International Tribunals.**—See for Egypt, MIXED TRIBUNALS.

Under the treaty of guarantee respecting Samoa, signed June 14, 1889, at Berlin between Great Britain, the United States, and Germany, a Court of highest jurisdiction has been created in these islands, with one judge, called Chief Justice, appointed jointly by the contracting Powers. The present Chief Justice (Mr. Henry Ide) is an American. See CAPITULATIONS; CONSUL; EXTE RRITORIALITY; TRIBUNALS OF COMMERCE.

**International Unions** are arrangements between States on different matters of international intercourse which lend themselves to joint operations. The existing unions relate to posts and telegraphs, industrial property (*q.v.*), copyright, railway traffic, the publication of customs tariffs, African slavery, metric measures, and the monetary system.

Berne, being the capital of the most central of the neutral European States, is the administrative centre of all these unions, with the exception of the Monetary Union, which is centralised at Brussels, and the Weights and Measures Union, whose office is in Paris.

*Posts and Telegraphs.*—The General Postal Union, the official title of which is the "Union Postale Universelle," was created by a treaty signed at Berne on Oct. 9, 1874. A similar union for telegraph communication was founded by a convention signed in Paris, May 17, 1875, which was revised at St. Petersburg and replaced by another, dated July 10–22, 1875. Both unions issue monthly bulletins, the one called *l'Union Postale*, and the other *Le Journal Télégraphique*. The Postal Bureau has also issued a *Recueil de renseignements sur les services internes des administrations de l'Union* and a *Dictionnaire des Bureaux de postes universel* (1895). For the convention, signed by twenty-six States, for the protection of submarine cables, see CABLES, SUBMARINE.

*Copyright.*—This union was created by the Berne Convention of Sept. 9, 1886. Its official title is *Union internationale pour la protection des œuvres*



*littéraires et artistiques.* The official bureau of the Union at Berne issues a periodical publication called *Le droit d'auteur*. See BERNE CONVENTION, and, under COPYRIGHT, *International Copyright*.

*Railway Traffic.*—This union, which applies to European continental goods traffic only, was formed by a convention, dated Oct. 14, 1890, and signed by nine States, which came into force Jan. 1, 1893. The central bureau at Berne issues a "bulletin mensuel." There is also a union among six Powers, signed at Berne, May 6, 1886, for matters of technical unification.

*Publication of Customs Tariffs.*—Under the convention forming this union, signed July 5, 1890, thirty States, including Great Britain and most British colonies, are associated for the prompt publication at their joint expense of the customs tariffs of the world, and of all modifications thereof. The tariffs are translated into English, French, German, Italian, and Spanish by the Brussels bureau, which also publishes a *Bulletin international des Douanes* in French, the official language of the union.

*African Slavery.*—This union, formed by the Brussels General Act of July 2, 1890, has offices at Zanzibar and Brussels for the centralisation of all information and measures connected with the suppression of slavery and the other matters dealt with in the General Act. The clauses of the General Act relating to these offices begin at Article 74. See Parliamentary Papers, Africa, No. 8A, 1890 [C.—6049-1.]. See SLAVE TRADE.

*Weights and Measures.*—By a convention signed at Paris, May 20, 1875, an international bureau was created, the official seat of which is Paris, for the purpose of comparing and verifying weights and measures on the metric system, and preserving identity for the contracting States.

*Monetary System.*—The double-standard *Union Monétaire Latine* was founded by the Convention of Dec. 23, 1865, between Belgium, France, Italy, and Switzerland. By a declaration dated Oct. 8, 1868, Greece has also entered the union. A single-standard union exists between Sweden, Norway, and Denmark under a convention signed May 27, 1873.

**Internuncio.**—See NUNCIO.

## Interpleader.

### TABLE OF CONTENTS.

<i>Preliminary.</i> —DEFINITION OF INTERPLEADER . . . . .	18	(a) In the High Court of Justice . . . . .	21
I. INTERPLEADER PRIOR TO THE INTERPLEADER ACT, 1831 (1 & 2 WILL. IV. C. 58) . . . . .	19	(b) In the County Court . . . . .	24
(1) At Common Law . . . . .	19	(c) In the Mayor's Court . . . . .	25
(2) In Equity . . . . .	19	(d) In Bankruptcy . . . . .	25
II. INTERPLEADER UNDER THE INTERPLEADER ACTS . . . . .	20	(2) By Sheriffs and other Officers . . . . .	26
III. MODERN INTERPLEADER . . . . .	21	(a) In the High Court . . . . .	26
(1) By Private Persons . . . . .	21	(b) In the County Court . . . . .	28
		(c) In the Mayor's Court . . . . .	29
		(d) In Bankruptcy . . . . .	30

### *Preliminary.*—DEFINITION OF INTERPLEADER.

(Fr. *enterplaider*, Lat. *interplacitare*.) A remedy available to a person who is under liability for any debt, money, goods, or chattels in which he claims no interest, and for or in respect of which he is or expects to be sued by two or more parties making adverse claims thereto. The cause of the interpleader being that a defendant shall not be charged to two severally.

where no default is in him (Viner's *Abr.* vol. ix. tit. "Enterpleader," p. 428).

#### I. INTERPLEADER PRIOR TO THE INTERPLEADER ACT, 1831 (1 & 2 WILL. IV. c. 58).

(1) *At Common Law*.—Interpleader, at common law, had a very narrow range of purpose and application (Story's *Equity Jurisprudence*, English ed., p. 540). So far at least as bailments are concerned, it was originally confined to cases where there was a joint bailment by both claimants (per Lord Cottenham in *Crawshay v. Thornton*, 1837, 2 Myl. & Cr. at p. 21), as distinguished from several independent bailments by them, to the same depositary (Story's *Eq. Jur.*, English ed., pp. 540, 541; but see Viner's *Abr.* vol. ix. tit. "Enterpleader," p. 429). However, the remedy was also, *semble*, available where there was a bailment by A. to a depositary to rebail to B., and both A. and B. sued the depositary in detinue (Story's *Eq. Jur.*, English ed., p. 540; and see *Rich v. Aldred*, 1704, 6 Mod. 216). As regards cases other than bailments, the process of interpleader was likewise applicable, where the thing in controversy came into the possession of another by finding, and the finder was sued in detinue by different persons claiming to be the owner in severalty (Story's *Eq. Jur.*, English ed., p. 540); to writs of *quare impedit* and writs of right of ward (Viner's *Abr.* vol. ix. tit. "Enterpleader," p. 428; Reeves' *Hist. of English Law*, Finlason's ed., vol. ii. p. 639; Story's *Eq. Jur.*, English ed., p. 541); and where, by two several offices in one and the same county, several persons were severally found heirs (7 Co. Rep. 45 a). As a general rule, interpleader was not allowed in any personal action other than detinue (Story's *Eq. Jur.*, English ed., p. 541), though, *semble*, it was available where one of two joint bailors brought detinue and the other trover against the bailee (Viner's *Abr.* vol. ix. tit. "Enterpleader," p. 428). There could not, however, be any interpleader at common law unless several actions were actually pending against the person praying for relief (Viner's *Abr.* vol. ix. tit. "Enterpleader," p. 429); the very object of the interpleader being that the two plaintiffs might be required to interplead (Reeves' *Hist. of English Law*, Finlason's ed., vol. ii. p. 637). Where only one of two bailors sued the bailee, a process very nearly allied to that of interpleader was adopted, namely, garnishment, whereby the bailee was enabled to call in the other party to the bailment, who, under the name of garnishee, became defendant to the suit, the original defendant (*i.e.* the bailee) being considered as out of court by the garnishment (Reeves' *Hist. of English Law*, Finlason's ed., pp. 633, 634; Simon on *Interpleader*, p. 3; and see *Rich v. Aldred*, 1704, 6 Mod. 216).

(2) *In Equity*.—The imperfect and inadequate remedy afforded at common law by process of interpleader was largely supplemented by equity, which enabled persons sued or in danger of being sued by several claimants of the same property, to file a bill of interpleader in Chancery to compel them to interplead either at law or in equity (Story's *Equity Jurisprudence*, English ed., p. 541; Calabacón on *Interpleader*, 2nd ed., p. 2). Interpleader in equity was defined to be where two or more persons claim the same debt or duty (per Lord Cottenham in *Crawshay v. Thornton*, 1837, 2 Myl. & Cr. at p. 19). That is to say, it was available where two or more persons claimed the same thing, and another person, not knowing to which of the claimants he ought of right to render a debt or duty or to deliver property in his custody, feared he might be hurt by some of them (Daniell's *Chanc. Prac.*, 6th ed., vol. ii. p. 1515). It was quite unnecessary, however, that legal proceedings should have been actually instituted by the claimants before the filing of the bill of interpleader, provided claims had actually been made (*Langston v. Boylston*, 1793, 2 Ves. Jun. 107; 2 R. R. 174; *Morgan v. Marsack*, 1816, 2 Mer. at p. 110). The bill could not, however, be sustained upon mere *equities*, but the claims were required to be grounded on *legal rights* (*Barclay v. Curtis*, 1821, 9 Price, 661); though it sufficed if the demand of one claimant was by virtue of an alleged *legal*, and of the other an alleged *equitable*, right (*Morgan v. Marsack*, 1816, 2 Mer. at p. 111). It was, moreover, essential that the person filing the bill should disclaim all interest in the property claimed (*Langston v. Boylston*, 1793, 2 Ves. Jun. at p. 103; 2 R. R. 174; Simon's *Interpleader*, p. 5), and that he should not be under any liabilities to either of the claimants beyond those arising from the title to the property in contest (per Lord Cottenham in *Crawshay v. Thornton*, 1837, 2 Myl. & Cr. at p. 19). There was apparently no objection to a bill being filed against the Crown or against defendants out of the jurisdiction (Daniell's *Chanc. Prac.*, 6th ed., vol. ii. p. 1519). To some extent, at least, the jurisdiction in equity to compel an interpleader followed the analogies of the law (Story's *Eq. Jur.*, English ed., p. 541; and see per Lord Brougham in *Pearson v. Cardon*, 1831, 2 Russ. & M. at p. 613). Thus, just as at law privacy of contract was generally necessary to found a jurisdiction in cases of bailment upon a writ of interpleader, so, in equity, in the case of rent claimed by several persons from a tenant, the latter was only entitled to file a bill of interpleader where the claimants claimed in privacy of contract or tenure (*Dungey v. Angove*, 1794, 2 Ves. Jun. 304; 2 R. R. 217; Story's *Eq. Jur.*,

English ed., pp. 545, 546); though, in ordinary cases, the equitable remedy by bill of interpleader was available where two or more persons severally claimed the same thing, under different titles or in separate interests, from another person (Story's *Eq. Jur.*, English ed., p. 541). In many respects, however, the equitable remedy differed from that at law, and was applicable to various cases not involving a mutual or joint bailment and not founded upon a finding by the plaintiff of the property claimed (see *Aldrich v. Thompson*, 1787, 2 Bro. Ch. 149; *Metcalf v. Harvey*, 1749, 1 Ves. 248; *Duke of Bolton v. Williams*, 1793, 4 Bro. Ch. 297, 430; *Angell v. Hadden*, 1808, 15 Ves. 244; s. c., 1809, 16 Ves. 203). As regards the form of the bill of interpleader, the plaintiff was required to state therein his own rights, to set forth the several claims of the defendants, make an offer to bring into Court any money due from him, and to pray that the defendants might interplead, so that the Court might adjudge to whom the thing in dispute belonged, and that the plaintiff might be indemnified (Mitford on *Pleadings*, 5th ed., p. 59). To the bill an affidavit by the plaintiff was annexed, stating that there was no collusion between him and any of the parties (Mitford on *Pleadings*, 5th ed., p. 60; Seton on *Judgments*, 5th ed., vol. i. p. 439; Com. Dig. tit. "Interpleader" (3 T), 5th ed., vol. ii. p. 670). At the hearing, the defendants were not required to enter into evidence against each other, as the sole question was whether they should interplead (Daniell's *Chanc. Prac.*, 6th ed., vol. ii. p. 1519); but if the question between them was then ripe for decision, the Court gave judgment, with or without costs, according to circumstances. Otherwise, proper inquiries or trials of issues of fact were directed, in order to bring the matters in controversy to a determination (Daniell's *Chanc. Prac.*, 6th ed., vol. ii. p. 1520). Such, briefly, was the practice in Chancery in cases of interpleader, over which an almost exclusive jurisdiction was exercised by Courts of equity until 1831, while from that date down to 1875, at all events, the jurisdiction was maintained currently with that at law (Daniell's *Chanc. Prac.*, 6th ed., vol. ii. p. 1516; Cababé on *Interpleader*, 2nd ed., p. 4). Now, however, by Order 57 of the Rules of the Supreme Court, 1883, the law and practice as to interpleader, in all Divisions of the High Court, have been assimilated, thus abrogating the differences on this subject between law and equity which formerly prevailed (*Annual Practice*, 1898, p. 1014; Seton on *Judgments*, 5th ed., vol. i. p. 440).

## II. INTERPLEADER UNDER THE INTERPLEADER ACTS.

As these enactments (with the exception of sec. 17 of the C. L. P. Act, 1860) have been repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49), a very brief reference to their provisions must suffice. The Interpleader Act, 1831 (1 & 2 Will. iv. c. 58), applied to two classes of persons, namely, (1) persons generally, and (2) sheriffs and other officers. With regard to the former class, the application of the Act was somewhat limited. For though it enabled the Courts of common law to grant relief by way of interpleader, in case of adverse claims to the same subject-matter, made upon persons claiming no interest therein (2 Chit. *Arch.*, 14th ed., p. 1354), it was apparently confined to conflicting claims of a legal character (2 Dan. *Chanc. Prac.*, 5th ed., p. 1418) made against defendants in actions of assumpsit, debt, detinue, and trover (Simon's *Law of Interpleader*, p. 17; *Lawrence v. Matthews*, 1836, 5 Dowl. 149), and did not abrogate the concurrent jurisdiction of the Court of Chancery in respect of claims within the Act (2 Dan. *Chanc. Prac.*, 5th ed., 1418), while the jurisdiction in respect of conflicting equitable claims was, *semble*, wholly unaffected by the Act (2 Dan. *Chanc. Prac.*, 5th ed., 1416, 1417; *Sturgess v. Claude*, 1832, 1 Dowl. 505; *Roach v. Wright*, 1841, 8 Mee. & W. 155; but see, *contra*, *Putney v. Tring*, 1837, 5 Mee. & W. 425; *Rusden v. Pope*, 1869, L. R. 3 Ex. 269). The Interpleader Act, 1831, did not apply to the Crown (*Candy v. Maughan*, 1843, 1 Dow. & L. 745), nor to a foreign claimant residing abroad (*Patormi v. Campbell*, 1843, 1 Dow. & L. 397), nor to cases in which the party seeking relief had given to any other of the litigant parties a right against himself independent of the property in dispute (*ibid.*). With regard, however, to the latter class of persons above mentioned, namely, sheriffs and other officers, the Interpleader Act, 1831, was most beneficial in its operation, as it enabled application for an interpleader order to be made, though no action had been commenced, provided that a *bond fide* claim had been actually preferred to goods lawfully seized (Day's *C. L. P. Acts*, 4th ed., p. 360, and cases there cited). Previously to the Interpleader Act, 1831, a sheriff taking goods in execution, to which there were rival claims put in, was, practically, without protection at law (Anderson on *Executions*, p. 231), though, in equity, a bill of interpleader was available to him where there were conflicting equitable claims on the property seized (*Hale v. Saloon Omnibus Co.*, 1859, 4 Drew. 492; *Child v. Mann*, 1867, L. R. 3 Eq. 806; 2 Dan. *Chanc. Prac.*, 5th ed., 1416; but see *Slingsby v. Boulton*, 1813, 1 Ves. & Bea. 334; Anderson on *Executions*, p. 232; Story's *Eq. Jur.*, English ed., p. 552). The provisions of the Interpleader Act, 1831, were, as regards both classes of persons comprised by it, supplemented by additional legislation (e.g. 1 & 2 Vict. c. 45), and notably by the C. L. P. Act, 1860 (23

& 24 Vict. c. 126), which enabled interpleader proceedings to be taken in respect of conflicting legal claims although the titles of the claimants had not a common origin, but were adverse to and independent of one another (s. 12). Eventually the Interpleader Acts were made applicable to all actions and all the Divisions of the High Court (R. S. C., 1875, Order 1, r. 2), but they have now, as already stated, been repealed.

### III. MODERN INTERPLEADER.

#### (1) *By Private Persons*; (2) *By Sheriffs and other Officers.*

(1) *By Private Persons.*—(a) *Proceedings in the High Court of Justice.*—All questions of interpleader in the High Court of Justice must now be determined by reference to Order 57 of the S. C. Rules, 1883 (*Annual Practice*, 1898, p. 1014). That order provides that relief by way of interpleader may be granted where the person seeking relief (in the order called the applicant) is under liability for any debt, money, goods, or chattels for or in respect of which he is or expects to be sued by two or more parties (in this order called the claimants) making adverse claims thereto (r. 1 (a)). There is a discretion to grant or refuse the interpleader under this rule (*Gerhard v. Montague*, 1889, 38 W. R. 76; 61 L. T. N. S. 564); but, on the other hand, there is jurisdiction to grant it though the rights of the rival claimants are not strictly identical (*ibid.*); but if the claims are altogether different, and the subject-matter of the claims is not the same, the application will be refused (*Greatorcx v. Shackle*, [1895] 2 Q. B. 249). Certificates of shares, and, *semble*, a chose in action, may be the subject of interpleader (*Robinson v. Jenkins*, 1890, 24 Q. B. D. 275, C. A.). Where, however, the question was, substantially, one of priorities of bills of lading, interpleader was refused (*Victor Sohn v. British, etc., Steam Co.*, W. N. 1888, p. 84). The titles of the claimants need not have a common origin, but may be adverse to and independent of one another (r. 3). Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons (r. 4). The application is made by summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them (r. 5). As to form of summons, see Daniell's *Chancery Forms*, p. 678. Where particulars of claim are furnished by a claimant, he is bound by them, and cannot claim anything not therein specified (*Hockey v. Evans*, 1887, 18 Q. B. D. 390). If there is no action pending, the summons must be an originating summons, to which no appearance is required to be entered (*Annual Practice*, 1898, p. 1016). The interpleader summons is returnable in Chambers before the Master, who, by virtue of Order 54, r. 12, of the S. C. Rules, 1883, now has all the jurisdiction in interpleader which a judge in Chambers possesses. The summons may be issued out of a district registry (R. S. C., 1883, Order 35, r. 5 (f)), in which case the district registrar has the same jurisdiction in the matter as the Master (*ibid.*, Order 35, r. 6). As regards service of the summons, it must be duly served on the plaintiff and claimant or claimants, if more than one (*Cababé on Interpleader*, 2nd ed., p. 52). Though leave has been given to serve a copy of the summons on a foreigner abroad (*Credits Gerundouse v. Van Wēde*, 1884, 12 Q. B. D. 171; *Van der Kan v. Ashworth & Co.*, W. N., 1884, p. 58), it seems to be doubtful whether, in view of the subsequent decision of the Court of Appeal in *In re Busfield*, 1886, 32 Ch. D. 123, leave in such a case would now be given (*Annual Practice*, 1898, pp. 1016, 1017; and see *In re La Compagnie Generale d'Eaux Minerales and de Bains de Mer*, [1891] 3 Ch. 451). If a claimant, having been duly served with a summons calling on him to appear and maintain or relinquish his claim, does not

appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him; but the order does not affect the rights of the claimants as between themselves (r. 10). The applicant for an interpleader must satisfy the Court or judge, by affidavit or otherwise, (a) that the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; (b) that the applicant does not collude with any of the claimants; and (c) that he is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a judge may direct (r. 2). For forms of affidavit, see *Chitty's Forms*, 11th ed., 664, 672, which, *semble*, seem to be still applicable (*Annual Practice*, 1898, p. 1016). As to what amounts to collusion sufficient to disentitle the applicant to relief, see *Murrietta v. South American, etc., Co.*, 1893, 62 L. J. Q. B. 396, from which it appears that collusion, in the sense in which it is used in this order (Order 57), does not necessarily involve anything morally wrong, but that it suffices if the applicant has agreed with one of the claimants to do what he can to defeat the claim of the other. If the application for interpleader be made by a defendant in an action, the Court or a judge may stay all further proceedings in the action (r. 6). The defendant is, moreover, entitled, on bringing into Court the amount claimed, to deduct from it his taxed costs up to that period, the question as to which of the parties shall bear the ultimate liability for those costs being reserved (*Searle v. Mathews*, W. N. 1883, p. 176; *s. c.*, 19 Q. B. D. 77, note (1)).

If the claimants appear in pursuance of the interpleader summons, the Court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute, in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff and which defendant (r. 7). For forms of order, see *Annual Practice*, 1898, Appendix K, Nos. 50 to 56, vol. ii. part i. Where, in any interpleader proceeding, it is necessary or expedient to make one order in several causes or matters pending in several Divisions, or before different judges of the same Division, such order may be made by the Court or judge before whom the interpleader proceeding may be taken and shall be entitled in all such causes or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such causes or matters (r. 14). When the claimant is made a substituted defendant, there is no jurisdiction to limit his defences to such as the original defendant could raise, since the words empowering the Court or judge to substitute any claimant as defendant "in lieu of" the applicant, the original defendant, do not mean that such claimant shall stand "in the actual place of," but "instead of," such defendant (*Gerhard v. Montague & Co.*, 1889, 38 W. R. 76; 61 L. T. N. S. 564). Should an interpleader issue be directed, it must, *semble*, be tried before a judge alone, unless trial by jury be expressly ordered (1 Seton on *Judgments*, 5th ed., p. 442), as provided by Order 31 of the S. C. Rules, 1883, which, with the necessary modifications, applies to an interpleader issue, as does also Order 36, with regard to inspection and discovery (r. 13). As to mode of preparing an issue in interpleader, see 1 Archbold's *Practice*, 13th ed., p. 733. After the issue has been directed, all the proceedings should be entitled in the issue and not in the original action (*Annual Practice*, 1898, p. 1017). In directing the issue, the judge is required to order which of

the claimants shall be plaintiff and which defendant (r. 7); but in considering whether security for costs must be given (a question determinable by the rules applicable to ordinary litigants) (*Rhodes v. Dawson*, 1886, 16 Q. B. D. 548; and see *Belmonte v. Aynard*, 1879, 4 C. P. D. 221; *Williams v. Crossling*, 1847, 16 L. J. C. P. 112), the question whether a party to an interpleader issue is to be treated as a plaintiff or as a defendant must be decided by the real merits of the case and not by the mere form of the issue itself (*Rhodes v. Dawson*, *ubi supra*). The Court or judge who tries the interpleader issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for (r. 13). The order made is final and conclusive, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal (r. 11). This, however, only applies to an order finally disposing of the whole matter of the interpleader proceedings. For where a judge tries an interpleader issue without a jury, an appeal lies on his findings of the facts (per Lord Esher, M. R., in *Ramsay v. Margrett*, [1894] 2 Q. B. at p. 22), or ruling of the law, as it will also, by virtue of sec. 19 of the Judicature Act, 1873, on any other judgment or order of a judge (*Dawson v. Fox*, 1885, 14 Q. B. D. 377). On the other hand, anything done in an interpleader matter, except what occurred at the trial of an issue, is not the subject of appeal (per Lord Esher, M. R., in *Field v. Rivington*, 1889, 5 T. L. R. at p. 642). When an appeal does lie, it must be brought before the expiration of fourteen days from the making of the order (Order 58, r. 15; *M'Nair & Co. v. Audenshaw Paint Co.*, [1891] 2 Q. B. 502). In respect of any miscarriage in the trial of the issue, there is a right to apply for a new trial, as in the case of the trial of any other issue (*Annual Practice*, 1898, p. 1020). Where an issue is tried by a jury, any motion for a new trial, or to set aside a verdict, must now be heard and determined by the Court of Appeal, and not by a Divisional Court (Judicature Act, 1890, 53 & 54 Vict. c. 54, s. 1).

Instead of directing an interpleader issue, the Court or a judge may, as provided by rule 8, with the consent of both claimants, or on the request of any claimant if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just. There is, it seems, a practical working rule at Chambers not to try the matter summarily under this provision, but to direct an issue where the value of the subject-matter is over £50 (per Lindley, L.J., in *Victor v. Cropper*, 1886, 3 T. L. R. at p. 111). From a decision under rule 8 there is no appeal, and no power to give leave to appeal under rule 11 (*Waterhouse v. Gilbert*, 1885, 15 Q. B. D. 569; *Bryant v. Reading*, 1886, 17 Q. B. D. 128; *Lyon v. Morris*, 1887, 19 Q. B. D. 139, C. A.), the order being final and conclusive against the claimants and all persons claiming under them (rule 11; and see sec. 17 of the C. L. P. Act, 1860). At any time, however, before making the final order, there is power to stay the drawing up of the order and rehear the matter (*In re Roberts*, W. N., 1887, p. 231, per Kay, J.). There is power to state a special case for the opinion of the Court where the question to be determined is one of law, and the facts are not in dispute (r. 9). Under such circumstances, the provisions of Order 34 of the S. C. Rules, 1883, as to special case govern the procedure (*ibid.*). Where the amount or value of the matter in dispute does not exceed £500, there is power to transfer interpleader proceedings to the County Court (Judicature Act, 1884, s. 17). With regard to costs, it is provided that the Court or a judge may, in or for the purposes of any

interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable (r. 15). The Master, on the hearing of an interpleader summons, cannot deal with the costs in the original action, and if he attempt to do so there is an appeal from his decision (*Hansen v. Maddox*, 1883, 12 Q. B. D. 100). A judge's order in interpleader as to costs, equally with any other order as to costs only, is final unless leave to appeal be given (*Hartmont v. Foster*, 1881, 8 Q. B. D. 82, C. A.; Jud. Act, 1873, s. 49).

(b) *Interpleader Proceedings in the County Court by Private Persons.*—First, as to the original jurisdiction of the County Courts in matters of interpleader. It is conferred by sec. 89 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), which provides as follows, namely:—

Every inferior Court which now has, or which may after the passing of this Act have, jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction, for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter claim, equitable or legal . . . in as full and ample a manner as might or ought to be done in the like case by the High Court of Justice.

It seems that this section is only applicable when rival claims are raised to any debt, chose in action, money, goods or chattels, with reference to which a proceeding is then pending before a County Court (*Annual County Court Practice*, 1898, vol. i. p. 146). This view is quite in accordance with the terms of Order 27, r. 13 a, of the County Court Rules, 1889, which now regulate the interpleader practice in the County Courts under the above enactment, and which only refer to cases where the rival claims are of such a nature (see generally, as to practice in interpleader in the County Courts by private persons, *Annual County Court Practice*, 1898, vol. i. pp. 146–148; *Yearly County Court Practice*, 1898, vol. i. p. 149).

Secondly, as to the derivative jurisdiction of the County Courts in interpleader matters. On this subject the Judicature Act, 1884 (47 & 48 Vict. c. 61), provides as follows:—

If it shall appear to a Court or a judge that any proceeding now pending or hereafter commenced in the High Court of Justice, by way of interpleader, in which the amount or value of the matter in dispute does not exceed the sum of £500 . . . may be more conveniently tried and determined in a County Court, the Court or judge may at any time order the transfer thereof to any County Court in which an action or proceeding might have been brought by any one or more of the parties to such interpleader against the others or other of them, if there had been a trust to be executed concerning the matter in question; and every such order shall have the same effect as if it had been for the transfer of a suit or proceeding under sec. 8 of the County Courts Act, 1867 [now replaced by sec. 69 of the County Courts Act, 1888]; and the County Court shall have jurisdiction and authority to proceed therein, as may be prescribed by any County Court rules for the time being in force (s. 17).

Under this enactment the High Court has, it seems, no power to remit, nor the County Court to try, an issue of interpleader in an action in the High Court, but only the entire interpleader proceedings (*Vizard v. Gill*, 1893, 95 L. T. Jo. 255). Moreover, after the order for transfer has been made, the County Court judge has no jurisdiction to allow a claim for damages to be added to the issue (*Oliver v. Lewis*, W. N. 1889, p. 224; C. C. Rules, 1889, Order 33, r. 9 b). Once an order remitting an interpleader issue to the County Court has been made under sec. 17 of the Judicature Act, 1884, the proceedings will remain for all purposes in the County Court (*Annual County Court Practice*, 1898, p. 452); but there is



the same right of new trial and appeal, and the practice on an appeal will be the same, as in other County Court proceedings (*Thomas v. Kelly*, 1888, 13 App. Cas. 506; *Annual County Court Practice*, 1898, p. 452). The practice of the County Courts in remitted interpleader proceedings is specially regulated by Order 33, r. 9 and *seq.* of the County Court Rules, 1889, to which reference must be made. Moreover, as provided by sec. 17 of the Judicature Act, 1884, above cited, any County Court rules for the time being in force are applicable.

(c) *Interpleader Proceedings in the Mayor's Court by Private Persons.*—The Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), provides as follows:—

Upon application made by or on behalf of any defendant in any action in the Court, such application being made after declaration, and, before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or supposed to belong to, some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such a manner as the Court may order or direct, it shall be lawful for the registrar to issue a summons calling upon such third party to appear in Court and to state the nature and particulars of his claim, and to maintain or relinquish his claim, which summons may be served upon such third party in any part of England or Wales; and upon such summons the Court may hear the allegations as well of such third party as of the plaintiff, and in the meantime stay the proceedings in such action, and finally order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more issue or issues; and also direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, dispose of the merits of their claims, and determine the same in a summary manner, and make such rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable (s. 32).

A copy of the summons herein mentioned must be served upon the plaintiff or his solicitor (Glyn and Jackson's *Mayor's Court Practice*, 2nd ed., p. 156), and the affidavit in support should be entitled in the original action, and made by the defendant or some other party showing facts sufficient to bring the case within the above section, and showing also that the plaintiff has declared but has not pleaded (*ibid.*). The judgment in any action or issue as may be decreed by the Court is final and conclusive against the parties and all persons claiming by, from, or under them, while the claim of a person not appearing is barred (Mayor's Court of London Procedure Act, 1857, ss. 33, 34). The following sections of the Com. L. P. Act, 1860, namely, 14 (giving power to Court or judge to decide summarily), 15 (enabling special case to be stated where facts undisputed), and 18 (as to proof of orders in interpleader proceedings), are, though repealed by the Statute Law and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), still applicable to interpleader proceedings in the Mayor's Court (to which they were extended by Order in Council of 20th November 1863); by virtue of sec. 7 of the repealing statute.

(d) *Interpleader Proceedings in Bankruptcy affecting Private Individuals.*—The general power given to Bankruptcy Courts by sec. 102 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), whereby they are enabled "to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide, for the purpose of doing complete justice, or making a complete distribution of property, in any such case," enables them to make interpleader orders. It appears, however, that



even before the Bankruptcy Act, 1869 (now repealed), the London Bankruptcy Court possessed this jurisdiction (Baldwin's *Law of Bankruptcy*, 7th ed., p. 15, n. (e)). See, further, Baldwin's *Law of Bankruptcy*, p. 15; Robson's *Bankruptcy*, 7th ed., p. 39.

(2) *Interpleader by Sheriffs and other Officers.*—(a) *In the High Court.*—The practice is governed by Order 57 of the Supreme Court Rules, 1883, and is, in most respects, identical with that prevailing in interpleader by private persons, which has already been dealt with, and to which reference must be made. It will therefore be sufficient in this place to indicate the differences that exist in the practice now under consideration, and which appear to arise from the different positions of the parties and their different relations to the subject-matter (Cababé on *Interpleader*, 2nd ed., p. 46). Order 57, r. 1, provides that relief, by way of interpleader, may be granted: “(b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels, taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued.” As to what are “proceeds or value” of goods, etc., under this section, see *Smith v. Critchfield*, 1885, 14 Q. B. D. 873. After a receivership order had been made in favour of a judgment creditor of a foreign company, an interpleader at the suit of persons claiming to be entitled to the goods of the company, as liquidators, under a foreign judicial liquidation, subsequently obtained, was refused (*Levasseur v. Mason & Barry*, [1891] 2 Q. B. 73, C. A.).

The claim referred to in Order 57, r. 1 (b), *supra*, must be in writing, and upon its receipt the sheriff or his officer is required forthwith to give notice thereof to the execution creditor, according to Form 28, App. B, Supreme Court Rules, 1883, or to the like effect, and the execution creditor must, within four days after its receipt, give notice, according to Form 39 in the same Appendix, to the sheriff or his officer that he admits or disputes the claim (r. 16). If the execution creditor should notify that he admits the claim, the sheriff may forthwith withdraw from possession, and may apply for, and when it is just and reasonable, will obtain, an order protecting him from any action in respect of the seizure and possession of the goods; notice of the intended application must, however, be given to the claimant, who is at liberty to attend the hearing before the judge or master, who may make all such orders as to costs as may be just and reasonable (r. 16A). After the execution creditor has withdrawn his claim, the sheriff is not entitled to an interpleader (*Sodeau v. Shorey*, 1896, 7 T. L. R. 240, C. A.), nor after his (the sheriff's) own withdrawal from possession (*Moore v. Hawkins and Others*, 1895, 43 W. R. 235, following *Kirk v. Almond*, 1832, 2 L. J. N. S. Ex. 13). Where, however, the interpleader is obtained in proper time, a sheriff guilty of trespass to land and goods, but who acted mistakenly, though *bond fide*, will be protected from the consequences of his conduct, provided no substantial grievance has been done to the person whose premises were wrongfully entered (*Smith v. Critchfield*, 1885, 14 Q. B. D. 873, following *Winter v. Bartholomew*, 1856, 11 Ex. Rep. 704; 25 L. J. Ex. 62). Even after a claim has been admitted by the execution creditor, the sheriff is not bound to pay over to the claimant, without an order, money previously received by him to release the goods taken in execution, and to abide the order of the Court (*Discount Banking Co. of England and Wales v. Lambarde*, [1893] 2 Q. B. 329), and the sheriff will be protected from an action brought against him to enforce payment of such money (*ibid.*). In this connection it may be stated that, after a claim to goods taken in execution has been made, the

Court or a judge may order the sale of the whole or a part of the goods seized, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just (r. 12). After an interpleader summons has been taken out in respect of goods seized, the execution creditor is not entitled to serve a bankruptcy notice on the judgment debtor under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, subs. 1 (g) (*In re Follows, Ex parte Follows*, [1895] 2 Q. B. 521).

When a sheriff interpleads, there is no necessity for him to make an affidavit in support of his application, and he will not be allowed his costs of such affidavit unless the Master has required him to make it (*Stocker v. Heggerty*, 1892, 67 L. T. 27). Again, he is not required to satisfy the Court that he is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a judge may direct (r. 2 c). Nor, *semble*, will he be required to deliver to a claimant any particulars (*Bauly v. Krook*, 1891, 65 L. T. 377).

The claimant of goods taken in execution must, in order to succeed, show that he himself has some title to or interest in the goods seized. Therefore where the evidence shows that the goods belonged to a third person other than the execution creditor, the claim will fail (*Richards v. Jenkins*, 1886, 18 Q. B. D. 451; see also *Carne v. Brice*, 1840, 7 Mee. & W. 183; *Green v. Rogers*, 1845, 2 Car. & Kir. 148; *Belcher v. Patten*, 1848, 6 C. B. 608; *Edwards v. English*, 1857, 26 L. J. Q. B. 193); but it will, however, it seems, be sufficient for the claimant to prove that he has a mere right to the possession of the goods seized (*Green v. Stevens*, 1857, 2 H. & N. 146). A good deal will, however, in each case depend on the form of the issue directed. It seems that if the execution debtor be in possession of the goods at the time the sheriff seizes, the claimant ought to be the plaintiff in the issue, that the onus of proof rests upon him of showing that he has a title to the goods which justifies his intervention, and that such onus can only be satisfied by proof of actual title in himself (*Cababé on Interpleader*, 2nd ed., p. 76). Even if, however, he offer *prima facie* evidence of such title, it will be open to the execution creditor to rebut it, by showing that the claimant has in fact no title, as by setting up the *jus tertii* (*ibid.*). The grantee of a bill of sale has, by virtue of his equity of redemption, a better right to the goods seized than the execution creditor (*Usher v. Martin*, 1889, 24 Q. B. D. 272, distinguishing *Richards v. Jenkins, supra*).

Though, as already stated on an earlier page, a summary decision in an interpleader matter, under Order 57, r. 8, is final and conclusive against the claimants (r. 11; C. L. P. Act, 1860, s. 17), it has not this effect against the sheriff, who may therefore appeal (*Smith v. Darlow*, 1884, 26 Ch. D. 605).

As regards costs, if the execution creditor admits the title of the claimant and gives the prescribed notice to that effect, he is only liable to the sheriff or officer for any fees and expenses incurred prior to the receipt of the notice admitting the claim (r. 16). Where the claim is either withdrawn or admitted, after the issue of the interpleader, but before the return day, the judge or master may, in and for the purposes of the interpleader proceedings, make all such orders as to costs, fees, charges, and expenses as may be just and reasonable (r. 17). A sheriff, being in no sense a party to the interpleader issue, nor a co-defendant, cannot be ordered to pay costs in interpleader proceedings, and if erroneously ordered to do so, his proper course is not to appeal, but to obtain a prohibition (*Temple v. Temple*, 1894, 63 L. J. Q. B. 556). On the other hand, he has been held entitled

to his costs of an appeal from the County Court where his interest in the appeal was one of costs (*Trickett & Co. v. Girdlestone*, 1897, 103 L. T. Jo. 81).

(b) *Interpleader by High Bailiffs and other Officers in the County Court.*—*First*, as regards the original jurisdiction of the County Courts in such matters. It is provided by the County Courts Act, 1888 (51 & 52 Vict. c. 43), that

If any claim shall be made to or in respect of any goods or chattels taken in execution, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar, upon the application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the Court as well the party issuing such process as the party making such claim, and the judge shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as he shall think fit, and shall also adjudicate between such parties, or either of them, and the high bailiff, with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and such orders shall be enforced in like manner as any order in any action brought in such Court, and shall be final and conclusive as between the parties, and as between them or either of them and the high bailiff, unless the decision of the Court shall be, in either case, appealed from; and, upon the issue of the summons, any action which shall have been brought in any Court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed (s. 157).

Under this section the County Courts have jurisdiction in interpleader, in the case of rival claimants to goods taken in execution (*Yearly County Court Practice*, 1898, p. 148). Upon the issue of the interpleader summons, any action of the kind designated in the last sentence of sec. 157 may be stayed. It has been held, however, that this provision applies only as between the execution creditor, the claimant, and the high bailiff, or one of them, and not therefore to an action against a purchaser of goods from the high bailiff (*Hills v. Renny*, 1880, 5 Ex. D. 313). Any claim for special damages resulting from the seizure should be made at the time of the interpleader proceedings, as no subsequent action in respect thereof can be maintained (*Death v. Harrison*, 1871, 40 L. J. Ex. 26). Where damages are claimed from the execution creditor or from the high bailiff for or in respect of the seizure of the goods, the claimant must now state in his particulars of claim to the goods seized the amount he claims for damages, and the grounds of his claim (County Court Rules, 1889, r. 7). The judge should amend the particulars, if they are insufficient, so that he may decide on the merits in each case (*Beswick v. Boffey*, 1855, 9 Ex. Rep. 315). He is not, however, bound to hear a case on insufficient particulars (*R. v. Chilton*, 1850, 15 Q. B. 220). If, however, he erroneously decides that they are insufficient, the High Court may direct him to hear the claim (*Yearly County Court Practice*, 1898, p. 298; *R. v. Richards*, 1851, 20 L. J. Q. B. 351; *Churchward v. Coleman*, 1874, L. R. 2 Q. B. 18). In all cases, however, the judge is bound to adjudicate at some time upon the claim, though the claimant's particulars are insufficient or have not been delivered in time (*Annual County Court Practice*, 1898, p. 356). As to the sufficiency of particulars of claim in interpleader in the County Court in respect of executions, see *Heslop v. M'George*, 1851, 18 L. T. 109; *R. v. Chilton*, 1850, 15 Q. B. 220; *R. v. Richards*, 1851, 20 L. J. Q. B. 351; *Hardy v. Walker, Ex parte M'Fee*, 1853, 9 Ex. Rep. 261; *Richardson v. Wright*, 1875, L. R. 10 Ex. 367). The judge upon the hearing must adjudicate upon any claim of the high bailiff for possession fees, and may, if he shall think fit, order the same, or such part thereof as he may think just, to be paid by the claimant or the execution creditor (County Court Rules, 1889, Order 27, r. 5). If an interpleader issue is decided against a claimant, and the execution creditor takes the money

deposited in Court by the claimant out of Court, the claimant does not thereby obtain any title to the goods, except as against the execution creditor; the latter cannot, however, retake the goods in execution (*Haddow v. Morton*, [1894] 1 Q. B. 95, 565).

As provided by sec. 157, an interpleader order is "final and conclusive as between the parties, and as between them or either of them and the high bailiff, unless the decision of the Court shall be in either case appealed from." With regard to an appeal, it is regulated by sec. 120 of the County Courts Act, 1888, and lies on the same grounds as in other cases. Where the value of the goods claimed does not exceed £20, and the claimant recovers less than £20 damages, there is no right of appeal (*Lumb v. Teal*, 1889, 22 Q. B. D. 675). Nor can a claimant appeal, even where the value of the goods is over £20, if the deposit made by him in respect of the goods seized was less than that amount (*White v. Milne*, 1888, 58 L. T. 225).

As regards costs, the scale applicable is, as is always the case, determined by the subject-matter. As to what constitutes the "subject-matter" in an interpleader proceeding, it means, (1) in the case of a claimant, the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged; (2) in the case of an execution creditor, the amount of the value of the goods seized, plus the amount of the damage (if any) claimed; and (3) in the case of a high bailiff, the amount of the damages claimed (County Court Rules, 1889, Order 50 (a), r. 12).

The practice in interpleader on executions generally is mainly governed by Order 27 of the County Court Rules, 1889, to which reference must be made. See also, generally, *Annual County Court Practice*, 1898, pp. 353-359; *Yearly County Court Practice*, 1898, pp. 147-150, and pp. 296-301.

Secondly, as to the derivative jurisdiction of the County Courts in interpleader or executions, it is derived from sec. 17 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), already set out on an earlier page. The practice under this section is governed by the County Court Rules, 1889, Order 33, r. 10 *a et seq.* The costs in the County Court are in the discretion of the judge, and may be taxed on such County Court scale as the judge may think just (r. 10 *b*); and the judge may order that the sheriff shall have his costs of the interpleader proceeding in the High Court, and may direct by which party the said costs shall be paid (r. 11). See also, generally, as to practice in remitted interpleaders, *Annual County Court Practice*, 1898, pp. 451, 452; *Yearly County Court Practice*, 1898, pp. 310, 311).

(c) *Interpleader Proceedings by Serjeant-at-Mace and other Officers in the Mayor's Court.*—Interpleader in the Mayor's Court, for the relief of persons generally, has already been described. Where the remedy is invoked for the relief of the serjeant-at-mace in execution of process against goods, the law and practice are prescribed by the following section of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.) :—

When any claim shall be made to or in respect of any goods or chattels taken or intended to be taken in execution under the process of the Court, or to or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful to and for the registrar upon application of the serjeant-at-mace or any of his officers, made before or after the return of such process, and as well before as after any action brought against such serjeant-at-mace or any of his officers, to issue a summons calling before the Court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of the superior Courts, or in any local or inferior Court of record, in respect of such claim, shall be stayed, and the Court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action

after the issue of such summons; and the said Court shall thereupon exercise for the adjustments of such claim, and relief and protection of the said serjeant-at-mace, or any of his officers, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the cases, and the costs of all such proceedings shall be in the discretion of the Court (s. 35).

As has already been seen, when treating of interpleader in the Mayor's Court by private persons, the practice in that Court in interpleader is still partly regulated by various sections of the Common Law Procedure Act, 1860, which were extended to the Mayor's Court by Order in Council of 20th November 1863, and are therefore still applicable by virtue of sec. 7 of the repealing statute (46 & 47 Vict. c. 49).

(d) *Interpleader by Sheriffs and other Officers in Bankruptcy.*—It has already been stated, when dealing with interpleader by private persons, that a Court of Bankruptcy possesses, by virtue of sec. 102 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), full power to decide all questions of priorities, and all other questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. With regard to interpleader by a sheriff, a very few words only are needed, and it should first be stated that the word "sheriff" in the Bankruptcy Act, 1883, includes any officer charged with the execution of a writ or other process (s. 168), and therefore comprises officers of inferior Courts charged with analogous duties (*Ex parte Warren, In re Holland*, 1885, 15 Q. B. D. 48; 54 L. J. Q. B. 320), but not a man who seizes, keeps possession of and sells, the goods of a judgment debtor by a direction of the sheriff (Mather's *Sheriff Law*, p. 366). The proper mode of application for an interpleader in bankruptcy by a sheriff is by motion (*Ex parte Streeter, In re Morris*, 1881, 19 Ch. D. 216), as prescribed by rule 27 of the General Rules in Bankruptcy. On such motion the Court has power to make an interpleader order (*Ex parte Sheriff of Middlesex, In re Buck*, 1879, 10 Ch. D. 575; *Ex parte Streeter, In re Morris*, 1881, 19 Ch. D. 216). In this connection it may be mentioned that sec. 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), provides that, in determining whether an execution debtor has committed an act of bankruptcy within that section, the period between the issue of an interpleader summons and the withdrawal of the sheriff, on the final disposal of the summons, is to be excluded from the twenty-one days therein mentioned. An interpleader order obtained by a sheriff does not affect the title of the official receiver or trustee in bankruptcy, under the Bankruptcy Act, 1890, s. 11, par. 1, to goods taken in execution (*In re Harrison, Ex parte Sheriff of Essex*, [1893] 2 Q. B. 111). The *jus tertii* cannot be set up in bankruptcy to defeat the execution creditor's claim (*Belcher v. Patten*, 1848, 6 C. B. 608; *Anderson on Executions*, p. 263). With regard to a sheriff's costs of execution, where bankruptcy supervenes, see rules 118, 119, and 119 a of the General Rules in Bankruptcy.

[*Authorities.*—All the principal authorities are cited in the text.]

**Interpretation. — Definition.** — By the interpretation of a document is meant the act of ascertaining what intentions the writer intended to convey to the reader by it, or, to use other words, what intentions are expressed in it.

It will be observed that this definition does not state whether in any

particular case the reader is to be at liberty to take into account any expression of the writer's intentions not contained in the document—all that it states is that, for the purpose of interpreting the document, such intentions are to be neglected.

It is sometimes said that to interpret a document we must ascertain the intentions of the writer. There is an ambiguity in the word "intentions." As thus used, it may mean intentions whether expressed in the document or not, or only those intentions which are expressed in the document. The latter is the meaning in which the word is used in the above definition. In other words, the question always is, "What did the writer mean by that which he wrote?" Not, "What did the writer mean to say?" (*Abbott v. Middleton*, 1858, 7 H. L. at 114; *Grey v. Pearson*, 1857, 6 H. L. 106).

The methods of ascertaining the intentions of the writer may be laid down in rules, which may be divided into two classes—rules of law and rules of construction.

Rules of law may themselves be divided into three classes—

*First.*—Those which state what is to be interpreted, which includes the question whether in any particular case evidence of intention of the writer not expressed in the document is admissible. Evidence of the latter nature is called "direct evidence of intention," or "evidence to prove intention itself as an independent fact."

*Second.*—Those which state what evidence is admissible for the purpose of ascertaining the meaning of the words employed in the document. Such evidence may be "intrinsic," i.e. evidence arising from the document itself, or extrinsic, sometimes called parol evidence, i.e. evidence which is not intrinsic.

Rules of this class are the only rules which can be used with success for the discovery of the expressed intentions, and accordingly they are used, perhaps unconsciously, by all educated laymen.

*Third.*—A few miscellaneous rules.

The nature and utility of rules of construction will be considered hereafter.

**Rule 1.**—Extrinsic evidence is admissible to show that the instrument is not binding on the ground of personal disability of the parties, fraud, mistake, or accident, or of its having been made for an unlawful consideration, such as to compromise a felony or of its having been executed as an escrow, subject to the performance of a condition precedent which has not been fulfilled.

In cases of this nature the evidence is admitted, not for the purpose of changing the interpretation of the instrument, but for the purpose of showing that it ought not to be interpreted (*Collins v. Blantern*, 1767, 2 Wils. 341).

It is obvious that this rule does not apply to statutes.

A will cannot be executed as an escrow. In all the cases where a will is said to be subject to a condition precedent it will be found that the condition is expressed in the will itself, so as not to fall under this rule.

**Rule 2.**—No extrinsic evidence is admissible for the purpose of contradicting, varying of or adding to the terms of an instrument *inter partes*, or a will (the *Countess of Rutland's* case, 1602, 5 Rep. 26 a; *Haynes v. Hare*, 1791, 1 Black. H. 659; *Goss v. Nugent*, 1833, 5 Barn. & Adol. 65; *Leggott v. Barrett*, 1880, 15 Ch. D. 309; *Abbott v. Middleton*, 1858, 7 H. L. 68; *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355).

In like manner no evidence of the proceedings of the commissioners on whose report a statute is founded (*Salkeld v. Johnson*, 1846, 2 C. B. 749; *Ewart v. Williams*, 1854, 3 Drew. 21), or of the proceedings in Parliament

(*R. v. Hertford College*, 1878, 3 Q. B. D. 693; *Richards v. Macbride*, 1882, 8 Q. B. D. 119), is allowed to contradict, vary, or add to the terms of a statute.

**First Exception.**—Where an instrument bears no date, or an impossible or inaccurate date, evidence is admissible to prove the date of execution (*Co. Litt.* 6 a; *Shep. Touch.* 55; *Goddard's case*, 2 Rep. 4 b; *Hall v. Cazenove*, 1804, 4 East, 477; 7 R. R. 611; *Randfield v. Randfield*, 1860, 6 Jur. N. S. 901).

At common law where no specific date was mentioned in an Act of Parliament as the date from which it was to take effect, it took effect from the first day of the session in which it was passed (*Latless v. Holmes*, 1792, 4 T. R. 660). But since the 8th April 1793, the commencement of the day indorsed on the Act as the date of its receiving the Royal assent is the date from which it takes effect (*Tomlinson v. Bullock*, 1879, 4 Q. B. D. 230).

**Second Exception.**—If the consideration is stated inaccurately, or is not stated, or if part only of the consideration is stated, extrinsic evidence is admissible to prove the true consideration so as it be not inconsistent with the consideration expressed in the document (*Shep. Touch.* 510; *Mildmay's case*, 1 Rep. 176 a; *Clifford v. Turrell*, 1828, 1 Y. & C. C. 149, s. c. on Ap. 9 Jur. 633).

**Rule 3.**—Evidence of admissions made by a party to or a person claiming under an instrument as to the meaning of it, or of his conduct after the execution of the instrument, cannot be received to alter, vary, or add to the terms of it (*Doe d. Norton v. Webster*, 1841, 12 Ad. & E. 442; *Clifton v. Walmesley*, 1794, 5 T. R. 564; *Simpson v. Margitson*, 1848, 11 Q. B. 23; *Clavell v. Littleton*, Fin. Prec. 305).

This rule does not apply to ancient documents, for reasons which will appear in the discussion of Rule 13.

**Rule 4.**—If the transaction is expressed in several instruments they must be construed together as explanatory of each other, and that whether they are executed simultaneously or not (*Hopgood v. Ernest*, 1859, 3 De G., J. & S. 116; *Lord Cromwel's case*, 2 Rep. 69 b).

If the instruments do not refer to each other, evidence is admissible to show that they relate to the same transaction (*Lord Cromwel's case*, 2 Rep. 69 b; *Thompson v. Webster*, 1860, 4 De G. & J. 600; s. c. in Dom. Pro. 7 Jur. N. S. 531; *Smith v. Chadwick*, 1882, 20 Ch. D. 62). It must, however, be remembered that in this case the transaction may offend against the Statute of Frauds or some other statute (*Peck v. North Staffordshire Rwy. Co.*, 1863, 10 H. L. 473) requiring the transaction to be reduced into writing, as it partly depends upon the parol evidence connecting the instruments.

In like manner, several statutes *in pari materia*, though made at different times, or even expired, whether referring to each other or not, must be taken and construed together as one system and as explanatory of each other (*R. v. Loxdale*, 1758, 1 Burr. at 447; *Smith v. Brown*, 1871, L. R. 6 Q. B. 729; *Murray v. East India Co.*, 1821, 5 Barn. & Ald. at 215; 24 R. R. 325).

**Rule 5.**—Extrinsic evidence of custom or usage is admissible to add to the provisions expressed in the instrument other provisions which are not inconsistent with it.

This rule depends upon the principle that the parties must have been supposed not to have expressed the whole of the contract by which they intended to be bound, but to have contracted with reference to the known usage. The contract is in fact partly expressed and partly implied, and the effect of the terms introduced by usage is the same as if they were expressed



in the instrument (*Hutton v. Warren*, 1836, 1 Mee. & W. 475; *Browne v. Byrne*, 1849, 3 El. & Bl. 715; *Heyworth v. Knight*, 1864, 17 C. B. N. S. 298).

This rule, it will be observed, applies to *implied* additional provisions, and must be carefully distinguished from those cases where extrinsic evidence is admitted to show that the usage of the trade or business has affixed particular meanings to the words *expressed* in the instrument. The distinction is clear. The rule under consideration says that under certain circumstances we are at liberty to add additional provisions to those contained in the instrument, while the rule referred to says how we are to determine the meanings of the words contained in it.

It need hardly be said that the rule does not apply where one of the parties to the instrument is ignorant of the usage, at all events where it is not the usage of all the persons engaged in the trade, but only of some of them (*Gabay v. Lloyd*, 1825, 3 Barn. & Cress. 793; *Robinson v. Mollett*, 1875, L. R. 7 H. L. 802; *Johnson v. Raylton*, 1881, 7 Q. B. D. 438; *Perry v. Barnett*, 1885, 15 Q. B. D. 388).

**Rule 6.**—Where part only of the transaction is expressed in an instrument, a collateral verbal contract, which is not inconsistent with the instrument, may be proved by extrinsic evidence (*Erskine v. Adeane*, 1873, L. R. 8 Ch. 756; *Morgan v. Griffith*, 1871, L. R. 6 Ex. 70; *Harris v. Rickett*, 1859, 4 H. & N. 1).

A case of this nature is not repugnant to rule 2, because the verbal agreement is collateral to that expressed in the instrument; in other words, the intentions expressed in the instrument have their full effect, and are not interfered with or modified by the verbal contract.

**Rule 7.**—If, owing to a rule of law, an instrument cannot take effect in the manner intended, it will, if possible, be interpreted so as to take effect in some other manner which will carry the expressed intentions into effect (*Co. Litt.* 42 a; *Goodtitle d. Edwards v. Bailey*, 1777, 2 Cowp. 600).

*Examples.*—A deed intended to operate as a charter of seisin, which failed to transfer the freehold for want of livery, was held to take effect as a deed of grant, as the land was in the possession of a tenant for years (*Doe d. Were v. Cole*, 1827, 7 Barn. & Cress. 243). An easement has been created by a covenant that the covenantee should enjoy it (*Holms v. Seller*, 3 Lev. 305). Many cases have occurred where a power has been exercised by the donee of the power, purporting to dispose of the property, subject to the power without purporting to exercise the power (see *Brodrick v. Brown*, 1854, 1 Kay & J. at 332).

We proceed to discuss the application of extrinsic evidence to the determination of the meaning of the words employed.

Almost every word is susceptible of more than one meaning; the question for the interpreter is, In which of these meanings was the word employed?

**Rule 8.**—Where the meanings of the words used in a document are in their primary meanings unambiguous (*Cholmondeley v. Clinton*, 1817, 2 Mer. at p. 344; 16 R. R. 167), and when such meanings are not excluded by the context (*ibid.* 2 Jac. & W. at 80), and are sensible with respect to the circumstances of the parties at the time of execution (*ibid.* 2 Mer. 344), such primary meanings must be taken to be those in which the words were used.

**Rule 9.**—Extrinsic evidence of the circumstances of the parties is admissible for the purpose of determining the primary meanings of the words employed, and for no other purpose whatsoever.

By primary, sometimes called literal, meaning is not necessarily meant



the primary etymological meaning, but either the meaning in which the words were usually employed at the time when the instrument was executed by persons of the class to which the parties belonged, or the meanings in which they must have been used having regard to the circumstances of the parties at the time of execution, or lastly, the meaning which the parties were in the habit of affixing to the words.

For example, clergymen and lawyers are persons belonging to different classes, they habitually use some words such as "prayer," "conversion," or "will" in different meanings; and in interpreting sermons by a clergyman, we should properly affix to these words meanings different to those which we should affix to them if used in the opinion of a lawyer. But if the clergyman said that he had executed his will, the context would show that he did not use the word "will" in the meaning in which it is generally used by a clergyman; and if it appeared that he had really executed his will, the circumstances would show that he used the word as referring to a certain instrument. It sometimes happens that a person habitually employs a word incorrectly, as, for instance, where he calls a person by a nickname; in this case it is clear whom he means when he uses the nickname.

Evidence is therefore admissible to prove—(1) the class to which the writer belonged, and the meanings habitually attached to the words employed by members of that class; (2) the circumstances under which the document was written; (3) the meaning in which the word was habitually used by the writer.

On the other hand, evidence that the writer employed the words in a special meaning is not admissible, as this would be interpreting his intentions as expressed in the document, together with intentions not expressed in it.

See these rules explained and classified in *Shore v. Wilson*, 1839, 9 Cl. & Fin. 355.

It may happen where the instrument is a contract that the primary meaning in which the words were used by one party differs from that in which they were used by the other; in this case the parties were not *ad idem*, and the contract is void (*Raffles v. Wichelhaus*, 1804, 2 H. & C. 906; *Higginson v. Clowes*, 1808, 15 Ves. 516; 10 R. R. 112).

It follows from Rule 8 that—

**Rule 10.**—The primary meaning of a technical word in an instrument relating to the art or science to which it belongs is its technical meaning (*Roddy v. Fitzgerald*, 1857, 6 H. L. 823; *Laird v. Briggs*, 1882, 19 Ch. D. 22).

As a corollary from the last rule we have the following:—

**Rule 11.**—In constructing a usual mercantile contract, the question is, In what sense have the terms been used in similar contracts? In the case of an unusual contract, Have the terms acquired any, and what, peculiar meaning in general mercantile language or in the particular trade? (*Lewis v. Marshall*, 1845, 7 Man. & G. 745; *Myers v. Sarl*, 1849, 3 El. & El. 306).

Where a document is ancient, the difficulty of obtaining evidence as to the primary meanings of the words may be insuperable; in this case we have to employ the two next rules.

**Rule 12.**—In interpreting an ancient document evidence is admissible of "contemporaneous" interpretation, *i.e.* of the interpretation placed on it by persons who live at or at a time not remote from the time of writing (2nd Inst. 136; *A.-G. v. Parker*, 1747, 3 Atk. 577; *Drummond v. A.-G.*, 1849, 2 H. L. at 861, 863).

This is sometimes incorrectly called the interpretation placed on the document by contemporaneous usage. "Usage" implies duration, and it is a rule that—

**Rule 13.**—In interpreting an ancient document evidence of the usage under it is admissible to explain any obscurity as ambiguity, but not to contradict its clear and unambiguous terms.

By usage is meant the acts habitually done with reference to some particular matter during a long period, and when such acts have been done by persons purporting to act under a document, they afford the best possible evidence as to the interpretation which those persons placed upon it. Occasional deviations from the regular course will not negative the existence of a consistent usage, for "it follows almost necessarily from the imperfection and irregularity of human nature that a uniform course is not preserved during a long period." A little change is made from time to time through ignorance or other causes; and when by the lapse of years the evidence is lost which would explain such irregularities, we must not too hastily assume that the received construction is therefore incorrect (see *R. v. Archdall*, 1838, 8 Ad. & E. 288).

Even evidence of modern usage is admissible (*Beaufort v. Swansea*, 1849, 3 Ex. Rep. 425; *Corporation of Hastings v. Ivall*, 1874, L. R. 19 Eq. 581). This rule applies to statutes (*Dunbar v. Roxburgh*, 3 Cl. & Fin. 335; *Neill v. Devonshire*, 1882, 8 App. Cas. 156; *Clyde Navigation v. Laird*, 1883, 8 App. Cas. 658).

Of course this rule does not apply where the construction is clear without it (*Sadlier v. Biggs*, 1854, 4 H. L. 458).

It sometimes happens that the writer adopts the language of an earlier document; in this case the question arises, Are we to interpret the words having regard to the circumstances of the writer after earlier or later documents? We must draw a distinction between private and public documents, as if the earlier document is private it is not certain that a person perusing the later document will have access to or even know of the existence of the earlier document, and it is impossible to suppose that the interpretation of the later document is intended to depend upon a fact which is uncertain.\* We arrive therefore at the following rule.

**Rule 14.**—The primary meanings of the words in an adopted private document must be ascertained, having regard to the circumstances of the person adopting them at the time of adoption.

The case of an adopted public document, as, for example, a statute or a common form used by conveyancers, is different. In a case of this nature the adopted document has been often interpreted, and it sometimes happens that by usage a special meaning is placed on the words in it, which is not necessarily the same as that which they bore at the time when it was written, or that which they would have borne if used by the person adopting them in an original composition. This meaning is sometimes called the "popular" meaning. The presumption is very strong that the person adopting the earlier document uses the words in their popular meaning.

**Rule 15.**—The primary meaning of the words in an adopted public document referring to the same subject is their popular meaning.

"When once certain words in an Act of Parliament have received judicial construction in one of the superior Courts, and the Legislature has repeated them in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them" (per James, L.J., *Ex parte Campbell*, 1870, L. R. 5 Ch. at p. 706; see also *Greaves v. Tofield*, 1880,

14 Ch. D. at p. 571; *Clark v. Wallond*, 1883, 52 L. J. Q. B. 322; *Barlow v. Teal*, 1885, 15 Q. B. D. at p. 405).

The practice of conveyancers as to the construction of common forms is of authority (*Smith v. Doe d. Jersey*, 1821, 2 Brod. & B. at p. 599; *Heelis v. Blain*, 1864, 18 C. B. N. S. at p. 108; *Howard v. Diecane*, 1 T. L. R. 87; *In re Ford and Hill*, 1879, 10 Ch. D. 370), though it is not conclusive (*In re Athill*, 1881, 16 Ch. D. at 223).

The rules for the application of intrinsic evidence are the following—

**Rule 16.**—Where the primary meanings of the words are excluded by the context, we must affix to them such other meanings as they can properly bear as will enable us to collect consistent intentions from the whole instrument.

See *Shep. Touch.* 87; *Throckmerton v. Tracy*, 1555, 1 Plowd. 161; *Hume v. Rundell*, 1824, 2 Sim. & St. 177; and see cases cited in *Cholmondeley v. Clinton*, 1820, 2 Jac. & W. 11, 12, 89; 22 R. R. 84).

**Rule 17.**—The context may show that words ought to be omitted, supplied, or transposed, or that false grammar or incorrect spelling ought to be corrected.

See as to supplying words, *Coles v. Hulme*, 1828, 8 Barn. & Cress. 568; 32 R. R. 486; *Lord Saye and Sele's case*, 1711, 10 Mod. 40; *In re Daniel's Settlement*, 1875, 1 Ch. D. 374; rejecting words, *Strickland v. Maxwell*, 1834, 2 C. & M. 539; *Wilson v. Wilson*, 1847, 15 Sim. 487; *Stone v. Corporation of Yeovil*, 1876, 1 C. P. D. 701; transposing words, *Co. Litt.* 217 b (*Fenton v. Fenton*, 1 Dr. & Wal. 66); as to correcting grammar, *Shep. Touch.* 55, 87 (*Earl of Shrewsbury's case*, 1610, 9 Rep. 47 b), spelling, 2 Rolle, *Abbr.* pp. 146 *et seq.* tit. "Obligation."

The case where the context shows that words ought to be omitted must be distinguished from those cases where they have to be disregarded as offending against a rule of law, as in *Bradley v. Peizoto*, 1797, 3 Ves. 324; 4 R. R. 7; *Holmes v. Godson*, 1856, 8 De G., M. & G. 152; *In re Machu*, 1882, 21 Ch. D. 838; *Corbett v. Corbett*, 1889, 14 P. D. 7.

The question as to what construction is to be placed on an instrument where the adoption of the primary meanings of the words leads to absurd consequences is by no means clear. In some cases we can modify these meanings by the context, and thus obtain a reasonable meaning; but if we cannot do so we must retain the primary meanings (*Hume v. Rundell*, 1824, 2 Sim. & St. at p. 177; *Laird v. Tobin*, 1 Mol. at p. 547; *Abley v. Dale*, 1852, 11 C. B. at p. 391; *River Wear Commissioners v. Adamson*, 1877, 2 App. Cas. at pp. 775, 776).

The miscellaneous general rules of law are the following:—

**Rule 18.**—A clause which merely states that which the law implies has no effect (*Co. Litt.* 205 a, 224 b; 2nd Inst. 365; *Borough's case*, 1595, 4 Rep. 73 b; 1536, Dy. 19 b, pl. 115; *Browne v. Dunnery*, 1617, Hob. 208).

**Rule 19.**—"Designatio unius est exclusio alterius" (*Co. Litt.* 210 a). "Semper expressum facit cessare tacitum" (*Co. Litt.* 183 b, 210 a). See *Aspdin v. Austin*, 1844, 5 Q. B. 684; *North Stafford Ryw. Co. v. Ward*, 1868, L. R. 3 Ex. 177.

**Rule 20.**—Where there are two repugnant clauses, the first in a deed and the second in a will shall prevail (*Doe d. Leicester v. Biggs*, 1809, 2 Taun. 113; 11 R. R. 533). It will be found that in many of the cases in which the rule appears to have been applied the true reason for rejecting the clause was that it was inconsistent with the rest of the instrument (see per Wilde, C.J., in *Walker v. Giles*, 1849, 6 C. B. 702).

There is some confusion between inaccurate and ambiguous descriptions.

An inaccurate description is one that does not exactly fit any person or thing, as "A's freehold house in London," where the only house that A. has in London is of copyhold tenure.

An ambiguous description is one that equally fits two persons or things, as "my nephew Tom," where I have two nephews called Tom.

There are two classes of ambiguities called "patent" and "latent." A patent ambiguity is where the ambiguity is apparent on the face of the instrument, as, for example, a gift in a will "to my nephew Tom or John." Here apparently the testator is uncertain whom he intended to benefit. Evidence, either extrinsic or intrinsic, admissible under our rules may clear up the ambiguity, as, for instance, by proving that Tom and John were two names by which the same person was known. See AMBIGUITY.

**Rule 21.**—Where, after the application of extrinsic and intrinsic evidence to determine the meanings of the words, and after applying such of the miscellaneous general rules as are applicable, there remains a patent ambiguity, the instrument is void for uncertainty (*Shep. Touch.* 251; *Bac. Elem.* r. 23; *Pearce v. Watts*, 1875, L. R. 20 Eq. 492), and no direct evidence of intention is admissible to explain the ambiguity (*Altham's case*, 1610, 8 Rep. 155 b; *Shore v. Wilson*, 1839, 9 Cl. & Fin. at pp. 555, 565; *Clayton v. Nugent*, 1844, 13 Mee. & W. at p. 200). Sometimes the ambiguity may be cured by the election of one of the parties (*Vin. Abr.* "Grants" (H) 5 *Mervyn v. Lyds*, 1553, Dy. 91 a; *Shep. Touch.* 251; *Hungerford's case*, 1585, 1 Leon. 30).

A latent ambiguity, often called an "equivocation," is not apparent to a person perusing the instrument, till, on the application of extrinsic evidence of circumstances, he discovers that a description which appears to apply only to only one person or thing really fits equally more than one person or thing.

**Rule 22.**—Intrinsic evidence is admissible for the purpose of determining which of several persons or things described by an equivocal description is intended.

**Rule 23.**—When, after the employment of all the preceding rules to the interpretation of the document, there remains an equivocation, extrinsic evidence of what was passing in the minds of the parties to the instrument at the time of execution is admissible for the purpose of determining which of the persons or things was meant by the equivocal description, or, in other words, "direct evidence of intention is admissible" (*Lord Cheney's case*, 1591, 5 Rep. 68 b; *Altham's case*, 1610, 8 Rep. 155 b; *Stringer v. Gardiner*, 1859, 27 Beav. 35; *Clayton v. Nugent*, 1844, 13 Mee. & W. at p. 200).

The reader is warned against a very common confusion as to the employment of "parol," i.e. "extrinsic," evidence. Many dicta will be found that parol evidence is not admissible to resolve a patent ambiguity, but that it is admissible to resolve an equivocation. In cases of this nature, by parol evidence is meant direct evidence of intention, and it is not intended that extrinsic evidence, under r. 9, is inadmissible for the purpose of ascertaining the meaning of the words employed.

The rules as to inaccuracies are the following:—

**Rule 24.**—Where a description as a whole fits no object, but part of it accurately fits an object, the rest of the description may be rejected (*Shep. Touch.* 247), but if neither the whole nor any part fits an object, the instrument or clause is void for uncertainty (1537, Dy. 15 b, pl. 81).

**Rule 25.**—Where the part of the description which gives certainty applies to more than one object, we have a case of equivocation, and direct

evidence of intention is admissible (*Beaumont v. Field*, 1818, 1 Barn. & Ald. 247; 19 R. R. 308; *Price v. Price*, 1799, 4 Ves. 679).

**Rule 26.**—Where the description as a whole fits no object, but part of it fits one object and other part fits another object, it is a case of patent ambiguity, and direct evidence of intention is not admissible (*Doe d. Hiscocks*, 1839, 5 Mee. & W. 363).

**Classes and General Names.**—A group of persons or things denoted by a common description, or having a common character, or holding the same position, constitute a class. A general name is one which equally describes every member of a class—as a child, a house. When we wish to describe a particular member of a class we must add an additional description to the general name, sufficient to differentiate the member from the other members of the class.

It will be observed that where more than one general name is applied to the same thing the statement is that the thing belongs to each class to which one of the general names is applicable; or, in other words, that the general names are mutually restrictive.

For example, "freehold" is a general name applicable to some houses and to some things which are not houses: "house" is a general name applicable to freeholds, copyholds, and leaseholds, while "freehold house" includes only those houses which are freeholds; or, in other words, those freeholds which are houses. So that the phrase "freehold house" is confined to members of a smaller class than the classes called "freeholds" or "houses."

We may describe a thing by several general names, and if we employ a sufficient number of them we can accurately describe the thing. It is, however, more common to employ both general names and an individual name, or a specific description which applies to one member of the class denoted by the general names.

A collective name, or noun of multitude, is the name of a group of things not necessarily of the same nature—as "manor," which includes corporeal and incorporeal hereditaments; "farm," which includes a house and arable and pasture lands.

**Rule 27.**—Where a thing is described by several general names, or by a general collective name, only that is meant which each name fits.

**Rule 28.**—Where a thing is described by a general or collective name and also by a special description, only that is meant which fits both descriptions (see *Wrottesley v. Adams*, 1558, Plow. 191; *Altham's case*, 1610, 8 Rep. 154 b).

**Rule 29.**—Where a thing is described by both general or collective and special descriptions, and nothing exists which satisfies all the descriptions, we must apply Rules 24–26.

A rule of construction differs in its nature from the rules which we have already discussed; it always takes the form following:—"If the phrase A. may mean either B. or C., it will in an instrument of a certain nature be taken in the meaning B., unless such meaning is excluded by the context." A somewhat sharp controversy is raging as to rules of this nature; some persons deny that they have any authority, while others consider that when the meaning of a phrase in a document has been the subject of judicial decision, the meaning so determined must necessarily be adopted in all documents of a like nature. These discordant views can perhaps be reconciled by distinguishing between the authority and the utility of a decision. The decision of the Attorney-General for the time being on any question relating to the etiquette of the Bar is conclusive; in other words, it is of

authority. The joint opinion of all the ex-Attorneys-General would probably be correct; in other words, it would be of great utility, but it would not be of authority. In like manner, the decision of a judge on a point of law, even if it be erroneous, is conclusive and must be followed in all similar cases, until it is reversed or disapproved of by a Court of Appeal. On the other hand, the decision of a judge on a question of construction, though it is of great utility, is not binding in similar cases. It may be asked how is it possible, if a decision is not binding, to form any rules of construction?

It must be remembered that a rule of construction is only necessary because the writer has not expressed himself with perfect freedom from ambiguity, and that the same ambiguity constantly occurs in different documents of a similar nature. It follows that if we can once determine the meaning of the inaccurate phrase in a document, the probability is large that we shall be correct in affixing that meaning on the same phrase occurring in another document of a like nature.

There is a high degree of probability that the decision of a judge as to the meaning of a phrase is correct; he is a person of great ability, he is accustomed to decide such cases, and he is assisted by the arguments of counsel.

When two judges arrive independently at the same conclusion, the probability that the decision is correct is large.

Suppose, for example, that only nine out of every ten decisions given by a judge are correct, he will be correct in ninety and incorrect in ten decisions out of a hundred. Now, if another judge arrives independently at the same conclusion, the judges will agree in nine-tenths of ninety (*i.e.* eighty-one) correct decisions, and be incorrect in one-tenth of ten (*i.e.* one) decision; so that the probability of decisions in which they agree being correct is already very great. Now, suppose that a third judge arrives independently at the same conclusion, they will agree in nine-tenths of eighty-one (*i.e.* in 76·9) correct decisions, and in one-tenth of one (*i.e.* ·1) incorrect decision, *i.e.* they will be correct in seventy-seven out of seventy-eight decisions, and there is a reasonable certainty that the decisions in which they agree are correct; in other words, their decisions establish a rule of construction.<sup>1</sup>

It has been said that rules of construction have a tendency to become rules of law; all that is meant by this is that after several decisions on the meaning of a phrase have been given to the same effect, a judge will defer to the prior decisions and give a similar decision, whatever would have been his decision if the matter had been *res integra*.

We proceed to give an example of a rule of construction.

**Ejusdem generis.**—Where property is described by a description which comprises the whole of a class, that class is what is intended, unless the circumstances or context show that only some members of the class are intended. For example, if a gentleman says to his valet, "I shall dine at my club; take my dress coat and other things there," the circumstances and context show that by "things" he only means those things that he will require for dressing.

It is a rule of construction that—

**Rule 30.**—Where a specific description of property sufficiently clear to show what is intended is followed by a description (introduced by the words "and also," or the like) of a class comprising the property specifically described, only those members of the class are intended which are of the

<sup>1</sup> There are no means of ascertaining the probability of the correctness of a judicial decision; but the probability of the correctness of a reported decision is greater than  $\frac{1}{2}$ .

same nature as the property specifically described. In other words, the object of naming the class is only to supply omissions in the specific description (see *Moore v. Magrath*, 1774, 1 Cowp. 12; *Lyndon v. Standbridge*, 1857, 1 H. & N. 51; *Rooke v. Kensington*, 1856, 2 Kay & J. 753; *Crompton v. Jarratt*, 1885, 30 Ch. D. 298; *Sandiman v. Breach*, 1827, 7 Barn. & Cress. 100; 31 R. R. 169; *Roths v. Kirkcaldy Waterworks*, 1882, 7 App. Cas. 706; *Anderson v. Anderson*, [1895] 1 Q. B. 749).

The difficulty in the application of this rule arises from the words "sufficiently clear to show what is intended," for what is clear to one person may not be clear to another; and unless the circumstances or the context show that the property specifically described, as distinguished from the whole class, is intended, the rule does not apply, and the description of the class has its full effect (*Anderson v. Anderson*, [1895] 1 Q. B. 749).

It is impossible within the necessary limits of this article to discuss the cases showing where the rule does not apply. We give, however, a few examples.

If the special description comprises the whole of a class it is obvious that the class introduced by the words "and also" must mean a different or larger class, and the rule does not apply (*Fenwick v. Schmalz*, 1868, L. R. 3 C. P. 313).

If something is excepted from the description of the class which is not *ejusdem generis* as the thing specifically described, the rule does not apply (*Iverson v. Gassiot*, 1857, 3 De G., M. & G. 958).

[*Authorities.*—The reader may consult Maxwell on the *Interpretation of Statutes*; Hardcastle's *Statute Law*; Hawkins on the *Interpretation of Wills*; Jarman on *Wills*; Theobald on *Wills*; Wigram on *Wills*; the Notes and Introduction to Davidson's *Precedents*; Vaizey on *Settlements*; Elphinstone, Norton, and Clerk on the *Interpretation of Deeds*; and Beal, *Cardinal Rules of Legal Interpretation*.]

**Interpreter.**—Where a witness is unable to speak English or is dumb, it is the practice to swear some person who understands the language or gestures of the witness, to interpret his evidence to the Court (Taylor on *Evidence*, 9th ed., s. 1376). The interpreter may be examined on the *voir dire* to test his competence, and if found incompetent may be rejected. Where discovery of documents in a foreign language is ordered, an interpreter or translator may be allowed to attend the inspection (Taylor on *Evidence*, 9th ed., s. 1809). Where an interpreter is employed for communication between solicitor and client, the communications made through him are as privileged as if made directly, and he is bound not to reveal them (*Du Barré v. Livette*, 1791, Pea. 108; 3 R. R. 655; *Wilson v. Rastall*, 1792, 4 T. R. 756; 2 R. R. 515; 20 How. St. Tri. 575 n.).

The oath ordinarily administered to an interpreter of oral evidence is as follows :—

You shall well and truly interpret and explanation make to the Court (and jury) and the witness of all such matters and things as shall be required of you to the best of your skill and understanding. So help you God.

Where the interpreter has to translate to a foreign witness, an affidavit to be sworn by the latter; the form of the interpreter's oath is as follows :—

You do swear that you well understand the English and — languages, and that you have truly and distinctly interpreted the contents of this affidavit to the deponent A. B.,

and that you will truly interpret the oath about to be administered to him. So help you God.

(See *Stringer on Oaths*, 2nd ed., pp. 86, 122).

The interpreter, like an ordinary witness, is entitled to be sworn by any ceremony which he declares binding on him, or in a proper case to affirm under the Oaths Act, 1888.

In criminal prosecutions, the expense of which may be allowed out of public moneys, if an interpreter is employed to interpret on the part of the prosecution, the Court of trial may make such allowances as to the Court seem reasonable. This regulation does not interfere with any other regulations which may be in force as to the remuneration of interpreters (Regulations of 9th June 1858, St. R. & O., Rev., vol. ii. p. 598). There is no express regulation where the interpreter is needed to interpret the evidence of witnesses for the defence; though the costs of the witnesses may in certain events be payable out of public funds (see COSTS, *Criminal Proceedings*).

In civil actions in the High Court in which an interpreter is necessary, his expenses are allowed on taxation, as party and party costs (*Bastard v. Smith*, 1839, 10 Ad. & E. 213). They appear to be treated as those of expert witnesses.

**Interrogatories.**—Relief by way of discovery could formerly only be obtained in the Courts of equity, and when a party in an action at law desired to administer interrogatories, he could only do so by means of a bill of discovery in the Court of Chancery. The Common Law Procedure Act, 1854, for the first time enabled interrogatories to be administered in actions in the superior Courts of law. Since the Judicature Acts came into force, discovery in High Court actions is subject to the Rules of the Supreme Court, and the principles on which discovery is granted are those which prevailed in equity, except where these are modified by the provisions of the Judicature Acts and the Rules (*A.-G. v. Gaskill*, 1882, 20 Ch. D. 519; see also *Lyell v. Kennedy*, 1883, 8 App. Cas. 217, 223, 233). The Rules of the Supreme Court relating to discovery do not, however, apply to matrimonial proceedings, discovery in which is regulated by a practice based partly on the old ecclesiastical practice, partly on that of the High Court (Order 68, r. 1 (*d*); *Redfern v. Redfern*, [1891] Prob. 139).

The subject of Interrogatories has already been dealt with in the article on DISCOVERY, to which the reader is referred generally, and in particular for the practice relating to their administration. In the present article it is intended mainly to consider what interrogatories are allowable, and what answers are sufficient.

The fact that parties have an adverse interest does not in itself give one the right to interrogate the other. The party interrogated must be an "opposite party" (Order 3, r. 1), one between whom and the party interrogating a question is litigated which the Court may decide (*Molloy v. Kilby*, 1880, 15 Ch. D. 162; *Eden v. Weardale Iron and Coal Co.*, 1887, 35 Ch. D. 287, 295). It has been pointed out that in the Chancery Division it may often be necessary to adjust rights between two plaintiffs or two defendants, and in such a case discovery of documents has been given against a co-defendant under Order 31, r. 12, which enables discovery of documents to be given against "any other party" to the cause or matter (*Shaw v. Smith*, 1886, 18 Q. B. D. 193, 197-200; *Alcoy Rwy. Co. v. Greenhill*, 1896, 74 L. T. 345); and it has been held that "other party" in this rule is equivalent to "opposite party" (*Shaw v. Smith*, *supra*).



Interrogatories must relate to questions of fact, not questions of law (Wigram, *Discovery*, s. 187; *Whately v. Crawford*, 1856, 26 L. J. Q. B. 163, 165). In *A.-G. v. Gaskill*, 1882, 20 Ch. D. 519, an action to prevent the obstruction of an alleged highway, an interrogatory asking whether there was a public footpath over the defendant's land was allowed; but the point that the question might be one of law was not raised.

The fundamental rule with regard to interrogatories is that they must be relevant. They are not limited to facts put directly in issue in the pleadings, but must relate to facts material to some question in issue in the litigation (*Jones v. Richards*, 1885, 15 Q. B. D. 439; *Marriott v. Chamberlain*, 1886, 17 Q. B. D. 154. In the latter case, a libel action, the defendant was allowed to interrogate the plaintiff as to allegations made by the plaintiff in letters and speeches, but not mentioned in the pleadings). Any other interrogatories are not permissible, even though they consist of questions which would be allowed on cross-examination (Order 31, r. 1). It is also probable that the interrogatories must be relevant to a question between the interrogating party and the party whom it is sought to interrogate. In equity, it seems that one party could not be required to give discovery relevant only to matters in question between the applicant and some other party to the suit (Bray, pp. 59, 60). In *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, an action by a shareholder, on behalf of company, against the directors, who were alleged to have defrauded the company, an order for discovery of documents was made, under Order 31, r. 12, against the company, who were joined as co-defendants, although the plaintiff claimed no relief against them. In substance, however, the order was made against the directors, who had control of the documents belonging to the company, and the decision can scarcely be relied on to prove a right to interrogate on a matter not in issue between the parties.

In order to be relevant, interrogatories must tend to support the case of the party interrogating, and must not relate exclusively to the manner in which the case of the opposite party is to be established (*Lyell v. Kennedy*, 1883, 8 App. Cas. 217, 224; Wigram, *Discovery*, 2nd ed., p. 15). The latter may be interrogated as to the facts on which he relies to establish his case, for a litigant is entitled to know the nature of the case which will be set up on the other side; but a party may not be interrogated as to the evidence by which he will seek to establish the facts material to his case (*Eade v. Jacobs*, 1877, 3 Ex. D. 335, 337). Thus, interrogatories may not be administered for the purpose of finding out the names of an opponent's witnesses, though, when their names are a substantial part of material facts, interrogatories as to such facts are not objectionable, because in answering them he will be obliged to disclose the names of the witnesses (*Eade v. Jacobs*, *supra*; *Marriott v. Chamberlain*, 1886, 17 Q. B. D. 154). There are many cases illustrating this principle. In *Birch v. Mather*, 1883, 22 Ch. D. 629, the plaintiff, in an action for the infringement of a patent, was allowed to interrogate the defendant as to the persons by whom prior user was alleged to have been made. In *Marriott v. Chamberlain* (*supra*), an action for libel, the defendant had accused the plaintiff of having fabricated a letter which the latter had said that the defendant had written, and the Court of Appeal held that the plaintiff might be interrogated as to the names and addresses of the persons to whom he alleged the letter had been sent by the defendant. On the other hand, in *Marshall v. Met. Dist. Ry. Co.*, 1890, 72 L. R. 49, an action for personal injuries, an interrogatory was disallowed, the object of which was to ascertain which of the defendant's servants saw the plaintiff at the time of the accident. In a

slander action the defendant is entitled to know the names of the persons in whose presence the slander was uttered, but the more convenient course is to apply for particulars of their names before delivering the defence (*Roselle v. Buchanan*, 1886, 16 Q. B. D. 656). See further, *Lyon v. Tweddell*, 1879, 13 Ch. D. 375, and the note to Order 31, r. 1, *Annual Practice*, 1898, p. 610.

On the principle that a party may interrogate to establish his own case interrogatories are allowable for the purpose of obtaining admissions which will dispense with the calling of evidence (*A.-G. v. Gaskill*, 1882, 20 Ch. D. 519), or for the purpose of ascertaining the names of persons who can give evidence in his favour (*Hall v. Liardet*, W. N. 1883, p. 175). So also he may interrogate as to the names of persons whom he is entitled or compelled to make parties to the action (*Hancocks v. Lablache*, 1878, 3 C. P. D. 197, 202; *Eyre v. Rodgers*, 1891, 40 W. R. 137).

It is legitimate to interrogate for the purpose of destroying the opponent's case (per Lord Esher, M. R., *Grumbrecht v. Parry*, 1884, 32 W. R. 358), or of putting him on oath as to its truth (*A.-G. v. Gaskill*, 1882, 20 Ch. D. 519, 527); but the former Chancery practice of interrogating, as a matter of course, as to every allegation in a statement of claim without regard to the question whether the interrogatories are reasonable, no longer exists (*ibid.* p. 529). An interrogatory asking whether certain allegations in the pleading of the opposite party were true, was disallowed in *Johns v. James*, 1879, 13 Ch. D. 370.

For the purpose of determining the relevancy of an interrogatory, the case of the party interrogating must be assumed to be true; otherwise the opposite party would have it in his power to escape being interrogated by simply denying that case (*Bray*, p. 18). If it be not certain, but only possible, that the answer to an interrogatory will be material, there is power to allow it (*Steward v. Lonsdale*, 1879, 42 L. T. 172), though of course the Court or judge has a discretion in the matter (Order 31, r. 2).

Interrogatories may be disallowed on the ground that they have been exhibited unreasonably or vexatiously, or that they are prolix, oppressive, unnecessary, or scandalous (Order 31, r. 7). By Order 31, r. 6, the objection may be taken in the affidavit in answer that any interrogatory is scandalous or irrelevant, or not *bona fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or that the interrogatory should not be answered on some other ground. The effect of the more recent r. 2 of Order 31, which says that only such of the interrogatories submitted shall be allowed, as the Court or judge shall consider necessary, either for disposing fairly of the cause or matter, or for saving costs, is that the granting of leave to interrogate is a matter of discretion, so that leave may be refused on the ground that the interrogatory is one which the party whom it is sought to interrogate could decline to answer.

Scandal is said to consist in the allegation of anything which is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; and any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous (*Dan. Ch. Pr.* p. 526). An interrogatory is, therefore, not scandalous merely because the answer may tend to criminate the party interrogated (*Fisher v. Owen*, 1878, 8 Ch. D. 645). It is said that nothing can be scandalous which is relevant (per Cotton, L.J., *ibid.* p. 653; *Dan. Ch. Pr.* p. 386). In its literal sense this statement cannot be quite accurate as regards

interrogatories. The objection in Order 31, r. 6, that interrogatories are scandalous, is distinct from the objection that they are irrelevant. The true principle seems to be that when justice to the party interrogating requires that the interrogatories should be answered, they will not be disallowed because their object is to establish scandalous facts. But when they may bring disgrace upon the opposite party, or a third person, they will be struck out as scandalous, if the interrogating party be asking for information beyond what is strictly essential to his case (see *Kemble v. Hope*, 1894, 10 T. L. R. 371).

Although in determining whether interrogatories are relevant, the truth of the case of the party interrogating is to be assumed, yet if the discovery be not relevant to the issue to be tried first, and will not be material if the other party succeed on that issue, discovery will be refused in the first instance if to compel it would be oppression (*In re Leigh's Estate*, 1877, 6 Ch. D. 256; *Parker v. Wells*, 1881, 18 Ch. D. 477). The question can, under Order 31, r. 20, be reserved until after the determination of the issue. There, where the action was for the alleged infringement of a trade mark, the plaintiff was not allowed to interrogate the defendant as to the sales of which he complained, until the issue whether there had been an infringement had been tried (*Fennessy v. Clark*, 1887, 37 Ch. D. 184. See also *Moore v. Craven*, 1870, L. R. 7 Ch. 96 n.; *Great Western Colliery Co. v. Tucker*, 1874, L. R. 9 Ch. 376).

The Courts are, in fact, unwilling to order discovery which may injure a party through the disclosure of his business or private affairs (*Moore v. Craven*, *supra*, at p. 97); but where the discovery is clearly material at the stage at which it is asked, it will not be refused on the ground of oppression because it involves such disclosure (*Saull v. Browne*, 1874, L. R. 9 Ch. 364, 368; *Leitch v. Abbott*, 1886, 31 Ch. D. 374; *Bray*, p. 300). For instance, in an action for breach of promise of marriage the means of the defendant are material on the question of damages, and he may be interrogated as to his pecuniary position (per Blackburn, J., *Hodsoll v. Taylor*, 1873, L. R. 9 Q. B. at p. 81). In an action for libel against a newspaper, the extent of its circulation is material on the question of damages; but when it is admitted, or a matter of notoriety, that the circulation of the newspaper is considerable, an answer will not be ordered to an interrogatory asking how many copies of the issue containing the libel were published (*Whittaker v. Scarborough Post Newspaper Co.*, [1896] 2 Q. B. 148, overruling *Parnell v. Walter*, 1890, 24 Q. B. D. 441). In the case of an obscure newspaper, when nothing is known about the extent of its circulation, such an interrogatory would be proper (*ibid.*).

Interrogatories, to answer which would involve much trouble or expense, are considered oppressive, when they will be immaterial if the party who seeks to interrogate do not succeed (*Parker v. Wells*, 1881, 18 Ch. D. 477). When, however, the answer to the interrogatories will enable the party interrogating, if he succeed at the trial, to obtain at once the relief which he claims, the interrogatories may be allowed if but little inconvenience be thereby caused to the other party (per Jessel, M. R., *Benbow v. Low*, 1880, 16 Ch. D. 93, 98; *In re Howel Morgan*, 1888, 39 Ch. D. 316).

• When an interrogatory is not answered or is answered insufficiently, the party interrogating may apply, under Order 31, r. 10, for an order requiring the party interrogated to answer, or to answer further as the case may be. A minute answer is not required; it is enough that the interroga-

tory is answered fairly and substantially (*Parker v. Wells*, 1881, 18 Ch. D. 477, 487; *Lyell v. Kennedy*, 1881, 27 Ch. D. 1, 16). The answer may refer to the answer to another interrogatory (*ibid.* p. 15). The Court or judge has not to consider the truthfulness of the answer, but only whether it be sufficient (*ibid.* p. 21). An answer is not sufficient which is evasive (*Tipping v. Clarke*, 1843, 2 Hare, 383, 390; *Richards v. Crawshaw*, 1892, 8 T. L. R. 446), or so involved as to be incapable of being used (*Lyell v. Kennedy*, 1881, 27 Ch. D. at p. 28), or so complicated that on an assignment of perjury a jury would have difficulty in ascertaining what was sworn (*Walker v. Daniel*, 1874, 22 W. R. 595).

An interrogatory may be insufficient by reason of impertinency, *i.e.* where it contains matter, in addition to the information asked for, which is improper, as destroying the effect of the answer or introducing irrelevant topics (*Peyton v. Harting*, 1873, L. R. 9 C. P. 9). An answer may, however, contain an explanation or qualification. Moreover, as under Order 31, r. 24, the interrogating party may use in evidence a part of an answer without putting in the whole of it, a further answer will not be ordered, if the part of the answer which directly answers the question can be separated from the other matter which the party interrogated has sought to put on the party interrogating (*Lyell v. Kennedy*, 1884, 27 Ch. D. 1, 15, 28, and on another application 33 W. R. 44).

A party interrogated may, on a question of sufficiency, refer to his whole affidavit in answer to the interrogatories (*ibid.*); and when the Court looking at all the answers together finds that every material question has been substantially answered, it will not order a further answer, because some particular answer might be more accurately framed (*Field v. Bennett*, 1885, 2 T. L. R. 122).

When an interrogatory requires a conversation to be stated, only the substance of the conversation need be set out in the answer (*Eade v. Jacobs*, 1877, 3 Ex. D. 335).

The party interrogated must answer to the best of his knowledge, information, remembrance, and belief (*Lyell v. Kennedy*, 1883, 9 App. Cas. 81, 85; *Bray*, p. 127). As regards recent matters within his knowledge, there is authority that the answer must be direct, without reference to remembrance or belief; but there is also authority for saying that the other party must be satisfied with such an answer as he swears he is able to give (see the cases cited, *Bray*, p. 129). As to matters not within his own knowledge, he must answer as to his information and belief (*ibid.* p. 128). He must, if necessary, inspect documents in his possession or power, or which he has a right to inspect, for the purpose of answering (*Taylor v. Rundall*, 1843, 1 Ph. 222; *Bray*, p. 134); but he is not bound to search public documents to obtain the information which is asked (*Glangall v. Frazer*, 1842, 2 Hare, 99, 103).

A party must answer as to matters not within his own knowledge, but of which his agents or servants have obtained personal knowledge in the ordinary course of their employment; and he is bound to obtain the information from them, unless he can show that it would be unreasonable to require him to do so, as, *e.g.*, when a servant or agent is no longer in his employment, or is at a great distance, or when to get the information would cause him an unreasonable expense (*Bolckow v. Fisher*, 1882, 10 Q. B. D. 161; see also *Hall v. L. & N. Ry. Co.*, 1877, 35 L. T. 848; *Alliott v. Smith*, [1895] 2 Ch. 111).

A party cannot be compelled to answer interrogatories asking as to his knowledge, information, and belief, if he swear that all his knowledge and

information are derived from privileged communications; for as his knowledge and information are then privileged, so also is his belief, which is founded entirely on them (*Lyell v. Kennedy*, 1883, 9 App. Cas. 81).

A party may refuse to answer an interrogatory as to relevant matters, on the ground that the answer will tend to criminate him or to make him liable to any punishment by way of penalties or forfeiture (*United States v. McRae*, 1867, L. R. 3 Ch. 79, 83; *The Mary*, 1868, L. R. 2 Ad. & Ec. 319; *Lamb v. Munster*, 1882, 10 Q. B. D. 110; *Alabaster v. Harness*, 1894, 70 L. T. 375). This rule must not be confounded with the rule that in an action which may result in a penalty or forfeiture no discovery will be given to the plaintiff. In such actions no interrogatories can be administered, or disclosure of documents obtained, in aid of the action (see article on DISCOVERY). The present rule applies where the discovery may expose the party interrogated to prosecution or punishment in some other proceedings (per Lord Herschell in *Derby Corporation v. Derby County Council*, [1897] App. Cas. at p. 552). The fact that it may do so is no reason why the interrogatories should be disallowed, though it is the duty of the Court to see that they are put *bonâ fide* and not in support of a fishing case (per Thesiger, L.J., *Fisher v. Owen*, 1875, 8 Ch. D. 645, 655). The objection to answer must be taken on oath in the affidavit in answer (*Allhusen v. Labouchere*, 1878, 3 Q. B. D. 654; *Webb v. East*, 1880, 5 Ex. D. 108; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124). In *Redfern v. Redfern*, [1891] Prob. 139, the Court of Appeal held that discovery cannot be obtained in a divorce action when it is sought for no other purpose than to prove the opposite party guilty of adultery. One reason given for this decision is that adultery is an ecclesiastical offence. According to the rule just stated, which was affirmed in the same Court in the later case of *Spokes v. Grosvenor Hotel Co.*, *supra*, this reason would only be a ground for an objection to answer specific interrogatories. It must, however, be borne in mind that the rules and practice of the Supreme Court relating to discovery do not apply to matrimonial causes; and the decision in *Redfern v. Redfern* can be supported on the ground that a person charged with adultery cannot, under the law of divorce, be asked questions tending to prove his guilt, and ought, therefore, not to be interrogated for the same purpose (see per Lindley, L.J., in *Redfern v. Redfern*, p. 143; per Lord Esher, M. R., and Chitty, L.J., in *Spokes v. Grosvenor Hotel Co.*, pp. 132, 134).

When it is not obvious on the face of the interrogatory that the answer may tend to incriminate or to expose to a penalty or forfeiture, the mere statement on oath of the party interrogated that he objects to answer on this ground may not be enough to entitle him to protection. He is not bound to show to what extent the discovery sought would affect him, for to do that he might sometimes have to deprive himself of the benefit he is seeking; but he must state circumstances consistent with the existence of the peril alleged which render that peril probable, or the Court must see from the circumstances of the case that there is reasonable ground to apprehend danger to him, if he be forced to answer. If the fact of his danger be once made to appear, great latitude must be allowed him in judging for himself of the effect of a particular question; for a question apparently innocent might form a link in a chain of evidence against him (*Short v. Mercier*, 1851, 3 Mac. & G. 205; *R. v. Boyes*, 1861, 1 B. & S. 311; 30 L. J. Q. B. 301; *Lamb v. Munster*, 1882, 10 Q. B. D. 110; *Ex parte Reynolds*, 1882, 20 Ch. D. 294).

The party objecting must state the reason of his objection, but he is not bound to say that the answer *will* make him liable to a punishment or forfeiture. He is protected if the answer *may tend* to bring him into peril; and when, from all the circumstances, such a tendency seems likely, his objection will be upheld though not expressed in precise language (*Lamb v. Munster, supra*).

The objection to answer may be taken when the danger of forfeiture or penal consequences arises under the law of a foreign country, as well as when it arises under the municipal law of England (*United States v. McRae*, 1867, L. R. 3 Ch. 79). Where, however, it is not made clear that an answer may render the person interrogated liable to punishment under a foreign law, and such liability will depend on his voluntary return to the foreign country, it seems that he must answer (*ibid.* p. 87, distinguishing *King of the Two Sicilies v. Willcox*, 1851, 1 Sim. N. S. 301).

A person interrogated may decline to answer as to matters tending to criminate him, although he has already disclosed enough to convict himself (*King of the Two Sicilies v. Willcox, supra*).

The objection cannot be taken when the only person who can enforce a penalty or forfeiture is dead (*Anon.*, 1682, 1 Vern. 6), or when the penalty or forfeiture has been waived, or when the time during which it can be enforced has come to an end (*United States v. McRae*, 1867, L. R. 4 Eq. at p. 338; *A.-G. v. Cunard*, 1887, 4 T. L. R. 177), even though the time only expired after the interrogatories were administered (*Burge v. Corporation of Trinity House*, 1828, 2 Sim. 411; *Williams v. Farrington*, 1789, 3 Bell's C. C. 38). Similarly, the objection cannot be taken in respect of an offence for which the person interrogated has been pardoned (*R. v. Boyes*, 1861, 1 B. & S. 311; 30 L. J. Q. B. 301).

The objection cannot be taken in respect of the liability to pay a sum which is in the nature of liquidated damages, as money which is recoverable, even under a statute, as liquidated damages is not considered a penalty (*Adams v. Batley*, 1887, 18 Q. B. D. 625; see also, as to this case, *Saunders v. Wiel*, [1892] 2 Q. B. 321).

There are statutes by virtue of which discovery cannot be resisted on the ground that it may disclose a criminal offence. Thus under 6 & 7 Will. IV. c. 76, s. 19, repealed and re-enacted by 32 & 33 Vict. c. 24, Sched. 2, interrogatories in libel suits cannot be objected to, the purpose of which is to get discovery of the name of the printer, publisher, or proprietor of the newspaper in which the libel appeared (*Ramsden v. Brearley*, 1875, 33 L. T. 322; *Lefroy v. Burnside*, 1879, 41 L. T. 199). The Act, however, provides that the discovery cannot be made use of in evidence in any other proceedings. Again, under sec. 27 of the Bankruptcy Act, 1883, a debtor or any other person may be examined by interrogatories with regard to the debtor's property or dealings, and the debtor cannot refuse to answer on the ground that the answer may criminate him. Any other person may, however, take the objection that the answer may criminate himself (*Ex parte Schofield*, 1877, 6 Ch. D. 231).

It is no ground for refusing to answer an interrogatory that the answer may subject another person to criminal proceedings (*King of the Two Sicilies v. Willcox*, 1851, 1 Sim. N. S. 301, 329), unless that other person be the husband or wife of the person interrogated (per Stephen, J., in *Lamb v. Munster*, 1882, 10 Q. B. D. at p. 113, citing Stephen's *Digest of the Law of Evidence*, s. 120).

Discovery, when relevant, may be refused on the ground of legal pro-

professional privilege. The objection is usually taken with regard to discovery of documents; it is seldom applicable to discovery by interrogatories. For the principles under which production of documents may be refused on this ground, see the articles on "Discovery" and "Documents," Bray, pp. 350-443, *Annual Practice*, note L, Order 31, rr. 2. 1. A party can, however, refuse to answer interrogatories on the ground that he has no knowledge or information as to the fact concerning which he is interrogated, except such as he has derived from communications which are privileged (*Lyell v. Kennedy*, 1883, 9 App. Cas. 81). When the privilege is properly claimed in law in the answer, a further answer cannot be required, unless it is clear, either from the nature of the matter for which privilege is claimed, or from statements in the answer itself or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated (*Lyell v. Kennedy*, 1884, 27 Ch. D. 1).

Public official documents are protected from disclosure when their production would be against the public interest, and, therefore, interrogatories ought not to be allowed as to the contents of an official document for which, when its production is required, privilege may be claimed (*Fitzgibbon v. Greer*, 1875, Ir. Rep. 9 C. L. 294. On the general question whether a party can be interrogated as to the contents of a document in a third person's possession, which is capable of being produced, see *Dalrymple v. Leslie*, 1881, 8 Q. B. D. 5; Bray, pp. 130-134).

**In terrorem** (by way of terrifying).—Certain conditions attached to gifts are said to be *in terrorem* and void if there is no gift over to some other person in the event of the original legatee refusing to comply with the condition. Thus a legacy left to a single woman on condition that she will not marry is *in terrorem* merely, and void unless there is a gift over (see the cases on this subject collected in Theobald, *Law of Wills*, 4th ed., pp. 500, 501).

**Interruption.**—The "interruption" which defeats a prescriptive right under sec. 4 of the Prescription Act, 1832, is an adverse obstruction by the owner of the servient tenement, and not a mere discontinuance of user by the claimant himself (*Carr v. Foster*, 1842, 3 Q. B. 581; *Cooper v. Straker*, 1888, 58 L. J. Ch. 26).

"The words 'interruption,' 'disturbance,' and the like in the covenant for quiet enjoyment mean lawful interruptions and disturbances only" (Elphinstone, *Interpretation of Deeds*, 483); but a covenant may be so expressed as to extend to all acts, whether lawful or not; as where a lessor covenanted that his lessee should enjoy the premises "against all claiming or pretending to claim" any right in them (*Chaplin v. Southgate*, 1717, 10 Mod. 384).

**Interval.**—The interval of not less than fourteen days which, by sec. 51 of the Companies Act; 1862, must elapse between the meetings of a company passing and confirming a special resolution, is an interval of fourteen clear days, i.e. exclusive of the dates of both meetings (*In re Railway Sleepers Supply Co.*, 1885, 29 Ch. D. 204); but a defect in this matter does not concern the company's creditors (*In re Miller's Dale, etc., Co.*, 1885, 31 Ch. D. 211). See further, *TIME, Computation of*.

**Intervention** in international law is the interference of one State in the affairs, whether domestic or foreign, of another State, or as between other States, without their consent, for the purpose either of maintaining or of altering the condition of things within it. "*Prima facie*," says Hall, "intervention is a hostile act, because it constitutes an attack upon the independence of the State subjected to it. Nevertheless its position in law is somewhat equivocal. Regarded from the point of view of the State intruded upon, it must always remain an act which, if not consented to, is an act of war. But from the point of view of the intervening Power, it is not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war. In the case, moreover, of intervention in the internal affairs of a State, or against a particular form of State life, it is frequently carried out in the interest of the Government or of persons belonging to the invaded State" (*International Law*, s. 88).

It is an essential characteristic of intervention that force is threatened, if the requirements of the intervening Power are defied. Mere representations or advice by a friendly State are called mediation (*q.v.*), and a reference of the dispute to the decision of a third Power is called arbitration (*q.v.*).

The principle of intervention on the ground of the national interest of the intervening Power is intimately connected with the right of self-preservation—a right which lies at the very root of international law, and which distinguishes it from national or domestic law (see INTERNATIONAL LAW; BALANCE OF POWER).

The Peloponnesian war, we know, was caused by alarm lest the balance of power among the States of Greece should be destroyed.

The foreign history of Rome was but a series of interventions in the affairs of other peoples, terminating generally in conquest.

After the break-up of the Roman Empire until and including the Thirty Years' War, the territorial development of European States, though there were numerous cases of intervention, was only taking the modern form under which intervention could become in anywise an institution. Even from then until the beginning of the present century the idea of justified, as distinguished from unjustified, intervention was not clear in men's minds.

The Holy Alliance, formed at the Treaty of Aix-la-Chapelle (1818), between Great Britain, Russia, Austria, and Prussia (to which France subsequently acceded), was, in the words of Wheaton—

Intended to form a perpetual system of intervention among the European States, adapted to prevent any such change in the internal forms of their respective Governments, as might endanger the existence of the monarchical institutions which had been re-established under the legitimate dynasties of their respective reigning houses. This general right of interference was sometimes defined so as to be applicable to every case of popular revolution where the change in the form of government did not proceed from the voluntary concession of the reigning sovereign, or was not confirmed by his sanction, given under such circumstances as to remove all doubt of his having freely consented. At other times it was extended to every revolutionary movement pronounced by these Powers to endanger in its consequences, immediate or remote, the social order of Europe, or the particular safety of neighbouring States. The events which followed the Congress of Aix-la-Chapelle prove the inefficiency of all the attempts that have been made to establish a general and invariable principle on the subject of intervention (*Elements*, p. 94).

The views of the British Government on the subject were laid down in Lord Castlereagh's despatch, 19th January 1821, as follows:—

The measures adopted by Russia, Austria, and Prussia at the Congresses of Troppau and Laybach . . . were founded upon principles adapted to give the great Powers



of the European continent a perpetual pretext for interfering in the internal concerns of its different States. The British Government expressly dissented from these principles, not only upon the ground of their being, if reciprocally acted upon, contrary to the fundamental laws of Great Britain, but such as could not safely be admitted as part of a system of international law. In the circular despatch, addressed on this occasion to all its diplomatic agents, it was stated that though no Government could be more prepared than the British Government was to uphold the right of any State or States to interfere where their own immediate security or essential interests are seriously endangered by the internal transactions of another State, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby; and did not admit that it could receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular State or States, or that it could be made, prospectively, the basis of an alliance. The British Government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into the ordinary diplomacy of States, or into the Institutes of the Law of Nations.

An example of intervention on the ground that it was necessary in order to prevent the illegal intervention of another Power was the British expedition to Portugal in 1826.

Mr. Canning, the then Foreign Secretary, however, disclaimed any intention of interfering in the internal affairs of Portugal, stating that when the British troops landed in the country "nothing would be done by them to enforce the establishment of the constitution, but they must take care that nothing was done by others to prevent it from being fairly carried into effect" (Speech in House of Commons, December 11, 1826).

Other cases of intervention were that of France and England in the hostilities between Belgium and Holland in 1830, where the action was directed against both in their joint interest.

That of the German Confederation and Austria in the Schleswig-Holstein difficulty in 1864 led to war between the intervening Powers.

Intervention in the affairs of the Ottoman Empire and the present British occupation of Egypt are instances belonging to current events showing that the principle is as strong as ever in Europe.

The United States, though following a policy laid down by Washington, adopt a strict rule of non-intervention as regards European politics and States; and in accordance with the Monroe doctrine (*q.v.*) claim a sole right of intervention as regards other American States.

Intervention on the ground of humanity, according to Historicus (Sir William Harcourt), is a high act of policy above and beyond the domain of law. If this is so, the intervention of Great Britain, France, and Russia in 1827 in behalf of the Greeks, and perhaps to some extent the present action of the European Concert, and that of 1860 to stop the persecution of the Christians of Mount Lebanon, were contrary to international law. The assertion of Historicus, however, seems based on too restricted a view of the motives which can justify intervention as among the community of nations.

Intervention at the request of rebels can in our opinion only be justified, even if then, where the rebel force is such as to warrant its treatment as a belligerent (*q.v.*).

The test of the legal character of intervention is whether or not the acts giving rise to it affect in so important a degree the interests of the intervening Power as to involve its domestic or foreign peace and security.

Thus, says Ferguson—

It may happen in the case of any State, that it becomes a matter of the highest importance affecting even the question of its existence, how affairs are conducted in

another State. In such a case it becomes impossible for a State to allow another country, intimately connected with its interests, to fall a prey to anarchy or to the domination of other Powers. Thus by a series of steps caused in the first instance by a condition of unrestrained anarchy in one State, another State may at last be compelled by the obligations of self-preservation to assume complete authority over the disturbed State (*Manual of International Law*, ii. p. 182).

See under TREATIES; TREATIES OF GUARANTEE, and *Intervention* under them.

[*Authorities*.—Phillimore, *Commentaries upon International Law*, London, 1879, vol. i.; Holland, *European Concert in the Eastern Question: A Collection of Treaties and other Public Acts*, edited with Introduction and Notes, Oxford, 1885; Lawrence, *The Principles of International Law*, London, 1895; Wheaton, *Elements of International Law*, 1st ed., 1836; edit. Lawrence, 1855; edit. Dana, 1866; edit. Boyd, London, 1880.]

**Intestacy**.—See DISTRIBUTIONS, STATUTE OF.

**In the Form**.—A statutory provision that something is to be done “in the form” specified is mandatory and not directory; this construction, however, is modified by the addition of the words “or to the like effect” (*Henry v. Armitage*, 1883, 53 L. J. Q. B. 111). Cp. IN ACCORDANCE WITH THE FORM.

**Intimidation** is putting a man in fear with a view of inducing him to enter into a contract or to pay money, or to do or abstain from doing some other act. It is a general term under which falls much that is usually spoken of as COERCION, EXTORTION, MENACES, THREATS. It is distinct from UNDUE INFLUENCE and CATCHING BARGAINS.

*Civil Matters*.—Where any contract (even a contract of marriage (*Scott v. Sebright*, 1887, 12 P. D. 21; *Ford v. Stier*, [1896] Prob. 1)) has been entered into under the influence of coercion, duress, menaces, or intimidation it may be repudiated and avoided, and any money paid or property parted with under it may be recovered. But the contract is voidable only, and not void, and the right to avoid it may be waived (*Ormes v. Beadell*, 1860, 30 L. J. Ch. 1).

The duress or intimidation must consist in threats of violence calculated to cause fear of loss of life or of bodily harm or actual violence or unlawful imprisonment or threat thereof to one party or his or her husband or wife or child by the other party to the contract, or by someone acting with his knowledge and for his advantage (2 *Co. Inst.* 483; *Cumming v. Ince*, 1847, 11 Q. B. 112; *Biffin v. Bignell*, 1862, 31 L. J. Ex. 189; see CONTRACT, vol. iii. p. 346; 56 & 57 Vict. c. 71, s. 62 (2)).

Threats of criminal proceedings have been held to be in the nature of duress (*Secar v. Cohen*, 1881, 45 L. T. 589; *Davies v. London and Provincial Marine Ins. Co.*, 1878, 8 Ch. D. 469; and see *R. v. Tomlinson*, [1895] 1 Q. B. 706).

A contract to give a letter of apology made as a condition precedent to withdrawal of a criminal prosecution for offences as to trade marks has been held not to be void for duress (*Fisher v. Apollinaris Co.*, 1875, L. R. 10 Ch. App. 297), but such a bargain savours of illegality (see Leake, *Contracts*, 3rd ed., 628).

Duress of goods is a form of compulsion akin to but not exactly amounting to intimidation. A contract obtained thereby, if in the nature of a compromise, is not voidable (*Skeate v. Beale*, 1840, 11 Ad. & E. 989), but money paid for release of goods wrongfully detained can be recovered (*Attlee v. Backhouse*, 1838, 3 Mee. & W. 633; 2 Sm. L. C., 10th ed., 419). Payment to get goods out of the custody of the law is not made under duress of goods (*Liverpool Marine Credit Co. v. Hunter*, 1868, 18 L. T. 749).

Duress of law or compulsion of law is subject to quite different considerations, and property parted with thereunder cannot be recovered (*Marriot v. Hampton*, 1797, 7 T. R. 269; 4 R. R. 439; *Fulham Vestry v. Moore*, [1895] 1 Q. B. 399; and see 2 Sm. L. C., 10th ed., 409).

Duress, if raised as a defence, must be specially pleaded under the Judicature Acts (Order 19, r. 15; *Heap v. Morris*, 1876, 2 Q. B. D. 630), just as was the case under the Common Law Procedure Acts (Reg. Gen. 1853, r. 8), and at common law (*Whelpdale's case*, 1604, 5 Co. Rep. 119).

*Criminal Law*.—1. Intimidation, save in exceptional cases, is not an excuse for committing a crime (see COERCION, vol. iii. p. 70). To what is there stated should be added, that the doctrine of marital coercion has been explained and minimised in *Brown v. A.-G. of New Zealand*, [1898] App. Cas. 234, where it is laid down that the fact of marriage creates no presumption of marital compulsion.

2. It is an offence summarily punishable to intimidate any person with a view to compel him to abstain from doing an act which he has a legal right to do, or to do an act which he has a legal right to abstain from doing (38 & 39 Vict. c. 86, s. 7). This enactment does not apply to seamen (s. 16), i.e. to persons actually employed or engaged on board a ship within the definitions of the Merchant Shipping Acts (*R. v. Lynch*, [1898] 1 Q. B. 61). The offence is triable summarily unless the accused elects to be indicted (see case last cited).

The decisions on the law as to intimidation in trade disputes up to 1875 are collected in Wright on *Conspiracy*, 1873, pp. 45–67, and Archbold, *Cr. Pl.*, 21st ed., 101. Intimidation in the Act of 1875 seems not to be necessarily limited to threats of personal violence, and is distinct from BESSETTING, picketing, and persistently following; but see the cases of *Gibson v. Lawson and Curran v. Treleaven*, [1891] 2 Q. B. 545; and see 55 J. P. 467).

In proceedings for the offence the information and conviction should specify with some particularity the acts which the intimidation is intended to affect (*R. v. Mackenzie*, [1892] 2 Q. B. 529; *Ex parte Wilkins*, 1895, 64 L. J. M. C. 221).

Proceedings have been occasionally taken by way of injunction to restrain intimidation of this kind. But the jurisdiction to forbid the commission of crime by injunction is doubtful (*Bonnard v. Perryman*, [1891] 2 Ch. 269; *Monson v. Tussaud*, [1894], 1 Q. B. 671; *Lyons v. Wilkins*, 1898, 14 T. L. R.).

3. It is an indictable misdemeanour at common law to intimidate a witness by threats or otherwise not to give evidence, and to intimidate or attempt to intimidate him into giving false evidence is subornation of PERJURY (see *R. v. Stevenson*, 1802, 2 East, 362; *R. v. Thomas*, 1824, 1 Car. & P. 472; *R. v. Hamp*, 1852, 6 Cox C. C. 167).

The first offence can also be punished summarily as contempt of Court (*Bromilow v. Phillips*, 1891, 8 T. L. R. 168).

• In the case of witnesses before a royal commission or a committee of either House of Parliament, or on an inquiry held pursuant to any statutory authority, summary remedies are given for threats for having given evidence or on account of the evidence given (55 & 56 Vict. c. 64).

4. Threats by letter or otherwise with intent to frighten or extort are dealt with under MENACES.

5. Threats to induce people to take certain forms of unlawful oath or join certain unlawful combinations are dealt with under SEDITION.

[*Authorities*.—Bullen and Leake, *Proc. Pl.*, 5th ed., 692; Pollock, *Contracts*, 6th ed., 576; Leake, *Contracts*, 13th ed., 77, 350–354.]

**Intoxicating Liquor.**—"Intoxicating liquor" means spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a licence from the Commissioners of Inland Revenue (35 & 36 Vict. c. 94, s. 74). Spirits is defined as to degree of strength in 23 Vict. c. 27, s. 21: "Any fermented liquor containing a greater proportion than forty per centum of proof spirit shall be deemed and taken to be spirits." Sec. 21 also contains a description of foreign wine: "All liquor which shall be sold or offered for sale by any person, whether licensed under this Act (*i.e.* 23 Vict. c. 27) or not, as being foreign wine, or under the name by which any foreign wine is usually designated or known, shall, as against the person who shall so sell or offer the same for sale, be deemed and taken to be foreign wine." Beer is defined in 1 Will. IV. c. 64, s. 32; and 32 & 33 Vict. c. 27, s. 2 (see also 43 & 44 Vict. c. 20, ss. 2, 40; 48 & 49 Vict. c. 51, s. 4). The expression "beer" now includes botanic beer, or liquor brewed from sugar and water which contains more than 2 per cent. of proof spirit, and, therefore, an excise licence is required for selling such liquor (*Howarth v. Minns*, 1887, 51 J. P. 7). Beer includes cider, and cider includes perry (43 & 44 Vict. c. 20, s. 40; 32 & 33 Vict. c. 27, s. 2). Sweets is defined to mean any liquor made from fruit or sugar, or from fruit and sugar mixed with any other material which has undergone a process of fermentation in the manufacture thereof (33 & 34 Vict. c. 29, s. 3; 43 & 44 Vict. c. 20, s. 40; 52 & 53 Vict. c. 42, s. 28). It was held in *Harris v. Jenns*, 1860, 9 C. B. N. S. 152, that justices were right in treating a liquid as wine when a chemist proved that it contained one ounce of alcohol to the four ounces.

An excise licence, and in many cases a justice's certificate, are necessary for the legal sale of intoxicating liquors. The licences are very numerous and complicated, and expire at different dates, such as the 31st of March, the 5th of July, the 10th of October, and so on. About 192,000 licences are taken out annually, producing a revenue of about £1,900,000 a year. The whole of this revenue, with the exception of the sums received from distillers, brewers, and packet-boat licences, is allocated in England and Scotland to the local taxation revenue. The licences may be broadly divided into two classes—those held by dealers or wholesale dealers, and those held by retailers. There is a further division into those which allow the liquors to be consumed on the premises, and those which only allow them to be sold for consumption off the premises. The latter class includes all the dealers and some retailers. Whenever beer, cider, or perry is sold in a less quantity than four and a half gallons it is a selling by retail (4 & 5 Will. IV. c. 85, s. 19). A. L. Smith, J., in *R. v. Jenkins*, 1891, 55 J. P. 825, distinguishes between wholesale and retail selling of beer thus: "I read the statutes to mean this, that a wholesale dealer can sell to a minimum of four-and-a-half gallon casks, and that anything under that a man under a wholesale licence cannot sell, but he must have a retail licence to do it. In other words, anything less than four and a half gallons is a retail

sale." A beer dealer who is entitled to sell not less than four and a half gallons or not less than two dozen reputed quart bottles at one time, cannot be treated as selling without a licence because he sells in pint bottles instead of quart bottles, provided the quantity sold at one time is the same (*Fairclough v. Roberts*, 1890, 24 Q. B. D. 350). As regards spirits, the sale of spirits in any quantity less than two gallons or than one dozen reputed quart bottles shall be deemed a sale by retail (43 & 44 Vict. c. 24, ss. 102, 104). A selling of foreign wines in less quantity than two gallons or in less than one dozen reputed quart bottles at one time is deemed a selling by retail (23 Vict. c. 27, s. 4). Selling sweets in those quantities is also selling them by retail (26 & 27 Vict. c. 33, s. 18; see also 11 & 12 Vict. c. 121, s. 9; 23 & 24 Vict. c. 113, s. 7). All persons making entry at the excise office as alehouse keepers, victuallers, or retailers are deemed sellers by retail of such liquors to all intents and purposes (35 Geo. III. c. 113, s. 9). Sales in larger quantities than those above mentioned would be regarded as wholesale or dealers' sales.

The wholesale licences are: spirit dealer's duty, ten guineas a year, expiring on the 5th of July; beer dealer's duty, £3, 6s. 1d., expiring on the 5th of July; wine dealer's duty, ten guineas, expiring on the 5th of July; and sweets dealer's duty, five guineas, expiring on the 5th of July. The following persons do not require to take out a licence: A brewer's or distiller's agent receiving orders for beer or spirits to be delivered direct from the brewer's or distiller's premises; persons selling foreign spirits or foreign wines in bond in quantities of not less than 100 gallons at one time to the same person; *bond fide* travellers taking orders for goods which their employers are properly licensed to sell. No licence is required for the sale of cider or perry in wholesale quantities. As to cases where a licensed dealer in wines and spirits who has agencies in other towns requires a licence for the place where the agent takes orders, the rule appears to be that if the dealer keeps in his own name or in the name of any other person premises and stores elsewhere, and has an agent to take his orders, he requires to be licensed there also; but if an agent elsewhere is not provided with premises, and takes orders as a traveller, then the dealer need not have a licence at the agent's address (*Stallard v. Marks*, 1878, 3 Q. B. D. 412; *Stuchberry v. Spencer*, 1886, 51 J. P. 181; 55 L. J. M. C. 141; Paterson's *Licensing Acts*, 11th ed., p. 5).

Wholesale dealers may take out what is called an additional licence, authorising them to sell liquors in retail quantities. An additional licence expires on the same date as a dealer's licence to which it relates. A magistrate's certificate is not required for such a licence if the premises for which a licence is required are used exclusively for the sale of intoxicating liquor, save in the case of a beer dealer's additional licence; but if other goods are sold on the premises, such as, for example, groceries, a magistrate's certificate is necessary.

A magistrate's certificate is required for a retail licence. A retail licence consists of two classes—a licence for the sale of liquor for consumption on the premises, and a licence for the sale of liquor for consumption off the premises. The "on" licences comprise publicans, beer retailers, wine retailers, sweets retailers, and cider retailers. For further information on this point, see LICENSING, *post*.

The sale of intoxicating liquors without a licence is directly forbidden. By sec. 3 of 35 & 36 Vict. c. 94 no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell.

the same. Any person selling or exposing for sale by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to the following penalties:—*First offence*, penalty not exceeding £50, or imprisonment with or without hard labour not exceeding one month; *second offence*, penalty not exceeding £100, or imprisonment with or without hard labour not exceeding three months, and the offender may, by order of the Court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors; *third and any subsequent offence*, penalty not exceeding £100, or imprisonment with or without hard labour for any term not exceeding six months, and the offender may, by order of the Court by which he is tried, be disqualified for any term of years or for ever from holding any licence for the sale of intoxicating liquors. In addition to the penalties for a second or subsequent offence, any licence held by the defendant may be forfeited, and all intoxicating liquor found in his possession and the vessels containing such liquor may be forfeited. No penalty shall be incurred by the heirs, executors, administrators, or assigns of any licensed person who dies before the expiration of his licence, or by the trustee of any licensed person who is adjudged a bankrupt or whose affairs are liquidated by arrangement before the expiration of his licence, in respect of the sale or exposure for sale of any intoxicating liquor, so that such sale or exposure for sale be made on the premises specified in such licence and take place prior to the special session then next ensuing, or (if such special session be holden within fourteen days next after the death of the said person, or the appointment of a trustee in the case of his bankruptcy or the liquidation of his affairs by arrangement) take place prior to the special session holden next after such special session as last aforesaid (35 & 36 Vict. c. 94, s. 3). A person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, is liable to a penalty not exceeding 10s.; on a second conviction within a period of twelve months, to a penalty not exceeding 20s.; and on a third or subsequent conviction within such period of twelve months, to a penalty not exceeding 40s. (*ibid.* s. 12). As to the metropolis, see 2 & 3 Vict. c. 47, s. 8. A licensed person knowingly permitting his premises to be the habitual resort of, or place of meeting of, reputed prostitutes, whether the object of their resorting or meeting is or is not prostitution, is liable, if he allow them to remain longer than is necessary for the purpose of obtaining reasonable refreshment, to a penalty not exceeding for the first offence £10, and not exceeding for the second and any subsequent offence £20 (35 & 36 Vict. c. 94, s. 14). See further, article on LICENSING, *post*.

The following excise penalties may be inflicted:—Selling beer without a licence, £20 (1 Will. IV. c. 64, s. 7); selling beer or cider, not for consumption *on*, without licence, £10, or for consumption *on*, £20 (4 & 5 Will. IV. c. 85, s. 17); selling beer or cider after being convicted of felony or of selling spirits without licence, a like penalty (3 & 4 Vict. c. 61, s. 7); beerhouse keepers selling wine, spirits, or sweets, etc., without licence, penalties under 6 Geo. IV. c. 81, ss. 26, 27; 3 & 4 Vict. c. 61, s. 20; not making entry of premises with excise, £200 and liquor forfeited (3 & 4 Vict. c. 61, s. 9); keeping a refreshment house without a licence, £20 (23 Vict. c. 27, s. 9); selling wine by retail without a licence, £20 (*ibid.* s. 19); selling wine after being convicted of felony, or selling spirits without licence, £20 (*ibid.* s. 22); refreshment house keepers selling wine not making entry of premises, £200 (*ibid.* s. 23); having spirits on entered premises, £50, liquor forfeited,

and wine licence void (*ibid.* s. 25); selling on board packet-boats without a licence, £10 (9 Geo. iv. c. 47, s. 3); dealer selling spirits by retail without a retail licence, £50 (43 & 44 Vict. c. 24, s. 102); retailer selling, etc., spirits to or buying, etc., from certified dealer or retailer not being licensed as a dealer, £50 (*ibid.*); dealer or retailer receiving, etc., British spirits of unlawful strength, £50 and spirits forfeited (*ibid.*); dealer or retailer having excess of stock, 20s. for every gallon in excess and excess to be forfeited (*ibid.* s. 103); person removing spirits exceeding one gallon not producing permit on request, £100, spirits forfeited, in default of payment of fine imprisonment with or without hard labour (*ibid.* s. 145); hawking spirits or selling on unlicensed premises, £100, spirits forfeited, in default of payment of fine imprisonment with or without hard labour (*ibid.* s. 146); selling spirits for unlawful purpose, £100, in addition to any other penalty (*ibid.* s. 147); unlawfully purchasing spirits, £100 (*ibid.* s. 148); possessing spirits on which duty has not been paid, fine of treble the value and spirits forfeited (*ibid.* s. 149). The penalties above mentioned are the maximum penalties.

See further on the law relating to intoxicating liquors, article on LICENSING, *post*, and Paterson's *Licensing Acts*, 11th ed., by William Mackenzie.

**Introduce Business.**—An agent whose claim to commission is to depend on his "introducing business" must in order to establish his claim to commission show that the particular business done out of which he seeks to claim it was the direct result of his agency. "It is impossible to affirm, in general terms, that A. is entitled to a commission if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction became the cause of the sale. In order to found a legal claim for commission, there must not only be a casual, there must also be a contractual, relation between the introduction and the ultimate transaction of sale" (per Lord Watson in *Toulmin v. Millar*, 1887, 58 L. T. 96). To be entitled to commission it is not necessary, however, that the agent should actually complete the contract or adjust its terms (*ibid.*). See Bowstead, *Digest of the Law of Agency*, article 62.

**Intrusion.**—Intrusion is one of the methods of *ouster* or dispossession of freeholds. Like abatement of freeholds (*q.v.*), it differs from other forms of *ouster* (*e.g. disseisin*), in that the wrongful entry by the stranger (technically called the "intrusion" and "intruder" respectively) takes place not while the rightful owner is in possession, but while such possession is vacant. Intrusion may be defined as the entry on land by a stranger upon the determination of a particular estate before, and so as to keep out of possession, the person entitled to the estate in such land expectant on such determination of the particular estate (*i.e.* the reversioner or remainderman). We may take the most frequent case as an instance: A wrongful entry, such as has been mentioned, on the death of a tenant for life. Intrusion differs from abatement in the fact that the person dispossessed by abatement is the heir at law or devisee.

The old remedy against the intruder—the writ of entry on intrusion—was abolished in 1833 by 3 & 4 Will. iv. c. 27. The same Act provided that (save in the cases of the disabilities in the Act mentioned) no entry should be made or action brought to recover land but within twenty years after the right of action accrued to the claimant, or some person whose

estate he claims. This period of twenty years was in 1879 shortened to twelve by 37 & 38 Vict. c. 57 (see *LIMITATION, STATUTES OF*). The present remedies are entry or an ejectment action (now more technically called an action for the recovery of land).

Informations of intrusion by the Crown should here be noticed. In spite of the fact that the Crown was not until 9 Geo. III. c. 16 bound by any provisions as to statutory limitation, already as early as 1693 the Statute 21 Jac. I. c. 14 enacted that whenever the king or those claiming under him had been out of possession for the space of twenty years, without taking the profits of any lands within the space of twenty years before information of intrusion brought to recover the same, the defendant might plead the general issue and retain possession until the trial. Accordingly, after an actual possession against the Crown for twenty years, the only remedy was by information for intrusion. In such an information the Crown might, as of right, lay the venue in any county, and the title of the Crown be tried in the information itself; the only effect of the statute being to throw the *onus* of proving title in the first instance on the Crown (*A.-G. v. Parsons*, 1836, 2 Mee. & W. 23; see also *A.-G. v. Hill*, *ibid.* 160).

The procedure in these informations in the Exchequer and other Crown suits was first assimilated to that in ordinary ejectment actions by 22 & 23 Vict. c. 21, and the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), and the rules thereunder. For this part of the subject, see *INFORMATIONS*.

**Invalid.**—See *INSUFFICIENT*.

**Invasion.**—See *WAR*.

**Invented Word.**—See *TRADE MARKS*.

**Invention.**—See *DESIGNS*; *PATENTS*.

**Inventory.**—The “inventory” of personal chattels required by sec. 4 of the Bills of Sale Act, 1882, to be annexed to a bill of sale is an “inventory” in the well-known business sense of the term, that is a list sufficiently detailed of the chattels meant to be included, such as is usually made for business purposes with regard to the particular subject-matter (*Witt v. Banner*, 1887, 20 Q. B. D. 114). In that case a bill of sale purported to assign “four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames”; this, however, was held an insufficient inventory. See also *Carpenter v. Deen*, 1889, 23 Q. B. D. 566; *Hickley v. Greenwood*, 1890, 25 Q. B. D. 277; *Davidson v. Carlton Bank*, [1893] 1 Q. B. 82.

**Investiture.**—Investitures formed the subject of a great conflict as between the spiritual and temporal authorities in Europe in the later part of the eleventh and the earlier part of the twelfth century. The secular power (as the Emperor in Germany and Italy and the King of England) claimed



the right to invest bishops and abbots of greater monasteries with the staff or ring, which were regarded in the Middle Ages as the symbol of authority, the ring signifying that the bishop was wedded to the Church, and the staff signifying that he was its shepherd.

The Church resented this intrusion of the secular sovereign into what it considered the spiritual domain; the secular sovereigns, on the other hand, claimed that they had a right to receive homage in respect of lay fiefs or fees held by ecclesiastical personages.

The question in England only became acute after the accession of Henry the First, when St. Anselm, who was at that time Archbishop of Canterbury, refused to receive investiture in this manner from Henry the First. The question in this country was settled at the Council of London, A.D. 1107, at which King Henry gave up the practice of lay investiture on the part of the king or any other layman by delivery of the staff and ring; St. Anselm on behalf of the Church agreeing at the same time that the bishops and other "prelates" (*i.e.* the greater abbots) should practically become the men of the king, by doing homage in respect of their temporalities or lay fees (as to this further, see articles BISHOP; HOMAGE). On this arrangement Lord Selborne observes: "Few compacts between the temporal and spiritual powers have been so long or so well observed in England as this, which has never been broken to the present day" (*Defence of the Church of England*, p. 20).

[*Authorities.*—*Chronicles of Florence of Worcester*; Gadmer, *Hist. Nov. Vit. Ans.*; Milman, *History of Latin Christianity*; Freeman, *Norman Conquest*; Stubbs, *Select Charters*; Stubbs, *Constitutional History*; Church, *Life of Anselm*; Phillimore, *Eccl. Law*, 2nd ed.]

**Investments.**—See TRUSTS; SETTLEMENTS; SECURITIES.

**Inviolability.**—See AMBASSADOR; DIPLOMATIC AGENTS; EXTER-RITORIALITY.

**Invoice.**—An invoice is a written account of particulars of goods delivered to a purchaser, and of their prices, and the charges concerning them. Some foreign countries require the invoices relating to imports to be vouched by their consuls, or verified by declarations as to their accuracy (*Palgrave's Dictionary of Political Economy*). As to the "custom entry" in relation to goods imported into the United Kingdom, see MERCHANDISE MARKS. The invoice generally accompanies the delivery, and its proper office is as a memorandum whereby the delivery and charges may be checked. There is consequently no presumption that it contains all the terms of the contract of sale; and unless it purports to be a complete memorandum, so as to form a contract in writing, it does not exclude parol evidence of terms which would vary the contract to be inferred from it without such evidence. Thus if an invoice in an ordinary form says nothing as to the time of payment, it may be shown, nevertheless, that the sale was upon credit (*Lockett v. Nicklin*, 1848, 2 Ex. Rep. 93). An invoice does not of itself constitute any ESTOPPEL (*q.v.*). Thus where a tradesman, at the request of his customer, included, in the invoice of goods purchased from him, some other goods, he was allowed to prove that he was not the seller (*Holding v. Elliott*, 1860, 5 H. & N. 117). But where a broker, instead of giving an ordinary

bought note (see vol. ii. p. 227, and *l.c.*), delivered an invoice to the buyer, this was held to be conclusive to show that he had acted as principal in the transaction (*Jones v. Littledale*, 1837, 6 Ad. & E. 486).

An invoice or bill of parcels is a sufficient memorandum in writing of the contract, within sec. 4 of the Sale of Goods Act, 1893 (replacing sec. 17 of the Statute of Frauds), if it contains all the material terms, and is signed by the party to be charged. The usual printed name of the seller at the top is a sufficient signature (*Schneider v. Norris*, 1814, 2 M. & S. 286; 15 R. R. 250; *Durrell v. Evans*, 1862, 1 H. & C. 174).

The description of the goods in an invoice is not a warranty that the goods sold accord with the description (see *Rook v. Hopley*, 1878, 3 Ex. D. 209, and the cases there cited; *Laidlaw v. Wilson*, [1893] 1 Q. B. 74).

The invoice delivered in respect of the goods may amount to a false trade description within the meaning of the Merchandise Marks Act (*q.v.*) applied to the goods (*Budd v. Lucas*, [1891] 1 Q. B. 408).

A receipted invoice does not need to be registered under the Bills of Sale Acts unless it forms part of the purchaser's title to the goods (see vol. ii. p. 130; *Manchester, etc., Rwy. Co. v. North Central Wagon Co.*, 1888, 13 App. Cas. 554; *Ramsay v. Margrett*, [1894] 2 Q. B. 18).

### **Inwards.**—See TRADING INWARDS.

**Ionian Islands.**—A chain of islands off the western coast of Greece, first united for administrative purposes by the Emperor Leo the Philosopher. In the fifteenth century most of the islands were ruled by Venice; in 1797 they were ceded to France; but the French were driven out by a Russo-Turkish force, and in 1799 the Emperor Paul set up the Republic of the Seven United Islands. In 1807 France recovered possession; but in time of war the islands were much at the mercy of the British navy. On the 9th November 1815 the Powers agreed to place the United States of the Ionian Islands under the protection of Great Britain. A Lord High Commissioner was appointed, but the local assemblies and Courts were not superseded. There was no appeal from the Courts of the islands to the King in Council. In the case of *The Leucade*, 1856, Spink's *Adm.* at p. 237, it was held that the islands formed a protected but an independent State, and that the inhabitants were not bound by Her Majesty's proclamation, forbidding her subjects to trade with Russia, issued at the beginning of the Crimean War. On the 14th November 1863 the islands were incorporated with the kingdom of Greece.

[*Authorities.*—See the treaties and other documents enumerated in Hertslet's *Treaties*, General Index, at p. 225; W. E. Hall, *Foreign Jurisdiction*, p. 205. The case of the Ionian ships in 1856 will be reported in 8 St. Tri. N. S., see p. 433 and p. 1229.]

**I. O. U.** ("I owe you").—This is a common form of acknowledgment of an account stated between the person signing the document and the person to whom it is addressed. It is usually framed as follows:—

I. O. U. the sum of £100  
C. D. (Signed) A. B.  
(Dated) January 1, 1898.

If the plaintiff in an action upon an account-stated produces an unaddressed I. O. U., signed by the defendant, it may be presumed to have been intended to be addressed to the plaintiff (*Fesenmayer v. Adcock*, 1847, 16 Mee. & W. 449). If it is shown that no debt in respect of which any account could be stated, existed when the I. O. U. was given, the document cannot be evidence of any such account; it is, under the circumstances, a promissory note or nothing, and as a promissory note it requires a stamp. An I. O. U. is not a negotiable instrument; it comprises no agreement, and consequently requires no stamp.

## Ireland.

### TABLE OF CONTENTS.

CONSTITUTION . . . . .	60	(b) <i>Meeting of Parliament</i> . . . . .	63
I. <i>The Crown in Ireland</i> . . . . .	60	(c) <i>Duration of Parliament</i> . . . . .	63
II. <i>Irish Parliament until Reign of James I.</i> . . . .	60	(d) <i>Oaths</i> . . . . .	63
III. <i>Number of Members at various Periods</i> . . . . .	61	(e) <i>Placemen and Pensioners</i> . . . . .	63
IV. <i>Restrictions on the Authority of Parliament — (a) Territorial; (b) from Privy Council; (c) from Competing Authority of English Parliament</i> . . . . .	61, 62	(f) <i>Mutiny Act</i> . . . . .	63
V. <i>Independence of the Irish Parliament</i> . . . . .	62	(g) <i>Money Bills</i> . . . . .	64
VI. <i>Points of Difference between the English and Irish Constitutions and Assimilations.</i> . . . .	63	(h) <i>Appropriation of Supplies and Civil List</i> . . . . .	64
(a) <i>Statute Law of Ireland</i> . . . . .	63	(i) <i>Independence of Judges</i> . . . . .	64
		(j) <i>Habeas Corpus</i> . . . . .	64
		(k) <i>Treason</i> . . . . .	64
		(l) <i>Religious Liberty</i> . . . . .	64
		(m) <i>The Franchise</i> . . . . .	64
		VII. <i>The Position of the Irish Parliament between 1782 and 1800</i> . . . . .	64
		VIII. <i>Union</i> . . . . .	65
		ALPHABETICAL LIST OF SPECIAL HEADS OF LAW . . . . .	66

### CONSTITUTION.

I. *The Crown in Ireland.*—The authority of the Crown in Ireland dates from the invasion of Henry II. (1172-73). Ireland ranked only as a lordship or dominion until the thirty-third year of Henry VIII., when the lordship of Ireland was erected into a kingdom, and the King of England became *ipso facto* King of Ireland (33 Hen. VIII. Ir. c. 1). The kingdoms were distinct, but the Crown of Ireland was inseparably annexed to the Crown of England. The various statutes altering the succession to the Crown in England were not re-enacted in Ireland, and the Irish Act of Recognition (4 Will. & Mary, c. 1) acknowledged that the Irish Crown follows the limitations settled by the English Parliament—"Whoever is king *de facto* in England is king *de jure* in Ireland," said O'Connell. This statement of the law is scarcely an exaggeration.

II. *Irish Parliament until Reign of James I.*—The common law was introduced into Ireland early in the reign of John. Courts of justice were then erected, and judges appointed in conformity with the law of England. Some writers (Blackstone amongst others) say that the common law was received by the Irish chieftains at the Council of Lismore in the winter of 1172-73. The assertion is based on the authority of Matthew Paris—"Rex apud Lismore Concilium congregavit, ubi leges Angliæ sunt gratanter receptæ." It is very doubtful, however, whether any Council met in the reign of Henry II. Charters were granted by the early kings, and the Irish Magna Charta in the first year of Henry III. The earliest extant record of an Irish Council is in the fifth year of John's reign (1204). The Councils probably resembled the English Councils, and met for similar purposes. The principle of elective representation was introduced in the year 1295, and from that period the legislative assemblies of Ireland may be described as Parliaments. To the Parliament of that year (Wogan's Parliament) representatives were summoned from twelve counties. In 1311 and afterwards citizens and burgesses attended. In some Parliaments we find representatives of liberties, i.e. places in which the great vassals exercised Palatine jurisdiction, and of certain ecclesiastical jurisdictions known as crosses (croces). In the reign of Henry VIII. (33 Hen. VIII.) chieftains of the Irish race attended, but they apparently had no voice in the proceedings, and were summoned rather as "assentors" to such laws as might be passed, than as representatives. In this

Parliament the Statute 33 Hen. VIII. Ir. c. 1, relating to the Crown, *supra*, was passed. In the reign of Elizabeth representatives from the provinces of Ulster and Connaught were for the first time summoned. The Parliament of James I. which met in 1613 was the first assembly representative of the whole kingdom without distinction of creed or class. The resemblance between the English and Irish Parliaments was complete in point of form and constitution. The division into two Houses had taken place probably about the same time as in England. The House of Peers was composed of lords spiritual and temporal; the House of Commons of knights, citizens, and burgesses. James I. summoned Convocation for the first time. Convocation, however, was not summoned regularly in the subsequent reigns, and did not meet after 1711. The Irish clergy, adopting a similar arrangement to that agreed to by Archbishop Selden in 1664 on behalf of the English clergy, had ceased to tax themselves.

III. *Number of Members at various Periods.*—Before the Reformation, when the abbots and priors were summoned, the lords spiritual outnumbered the lords temporal. In the reign of Elizabeth the number of temporal peers was thirty-two, and of bishops twenty-two. In 1681 the number of temporal peers had increased to 119, in 1790 to 188, and in 1800 to 232. In later times many temporal peers were absentees having no connection with Ireland, and voting by proxy (see *Peerage, infra*). The number of counties originally established in the reign of John was twelve, Henry VIII. added one, Mary two, Elizabeth seventeen—making up the existing number, thirty-two. In Ireland counties, like boroughs, could be created by prerogative without resorting to Act of Parliament. According to Davis the number of members of the House of Commons in the time of Henry VIII. could not have exceeded 100. In Perrot's Parliament (1585) the members of the House of Commons numbered 126. In 1613 James I. summoned 232 members, including representatives from forty newly-created boroughs. "What if I had created 400 instead of 40," said the king; "the more the merrier, the fewer the better cheer." Boroughs were created by all the Stuarts, and some as late as 1692. In this year the number of members of the House of Commons was 300, and so continued while the Irish Parliament was a separate legislature.

IV. *Restrictions on Authority of Irish Parliament.*—(a) *Territorial.*—The legislative authority of the Irish Parliament was in the earlier periods restricted to the district occupied by the English settlers ("the Pale"), some outlying portions of the country known as "the Shire ground," and to the possessions of such of the Irish chieftains as had accepted "the custom of Englishry." It is noteworthy that the term "Pale" does not occur in any State paper before 1515, when it was defined as including a portion of the eastern seaboard extending from Dundalk to Dalkey. While thus practically restricted, the statutes were in terms generally inclusive of the whole kingdom. In some statutes, however, a broad line of separation was drawn between the Englishmen on the one hand and the natives and the degenerate English on the other. The earliest of these Acts is the Statute of Kilkenny (1367), the latest the 28th Hen. VIII. c. 5. Their object was to prevent all commerce with the Irish and the adoption of Irish customs. Intermarriage, fostering, and gossiping with the Irish were visited with the penalties of high treason. The English were also forbidden to wear long hair, shave the upper lip, wear clothes dyed with saffron, attend Irish fairs, or adopt Irish customs. The Parliament of James I. repealed this penal code, and, not satisfied with the mere repeal, declared that the whole of the king's subjects had been taken into His Majesty's gracious protection, and that there was no better way of securing peace than by allowing all the king's subjects to commerce and match together. Thenceforth the legislative authority of Parliament extended to all the subjects of the kingdom.

(b) *From Privy Council.*—The territorial restriction disappeared, but there remained two other checks on the authority of Parliament—one partly internal, due to the control of the Privy Councils; the other external, arising from the competing authority of the English Parliament. What may be called the internal check was imposed by one of the statutes passed at Drogheda in 1495, commonly known as Poyning's Law. It was enacted that no Parliament should be held in Ireland until the causes and considerations and all such Acts as ought to be passed were certified to the king, and the king's licence to the holding of Parliament obtained; and only such Acts as were affirmed by the king could be introduced. By the 3 & 4 Phil. & Mary, Ir. c. 4 (an Act to explain Poyning's Law), permission was given to certify Acts to the king during the sitting of Parliament. In the seventeenth century a practice arose of recommending heads of Bills—these differing from statutes in the form, "We pray that it may be enacted," instead of "Be it enacted." Conferences between the two Houses were consequently rather frequent, in order to secure a joint recommendation. Lord Mountmorres states the procedure before 1782: "Propositions for laws, or heads of Bills as they are called, originated indifferently in either House. After two readings and a committal they were sent by the Council (i.e. the Irish Privy Council) to England, and were submitted usually by the English

Privy Council to the Attorney- and Solicitor-General, and from thence they were returned to the Council of Ireland, from whence they were sent to the Commons, if they originated there (if not, to the Lords); and after three readings they were sent up to the Lords, where they went through the same stages, and then the Lord Lieutenant gave the Royal assent in the manner which is observed in Great Britain. In all these stages in England and Ireland any bill was liable to be rejected, amended, or altered; but when they had passed the Great Seal of England no alteration could be made by the Irish Parliament." Thus the Parliament was controlled by the Irish Privy Council, and the Privy Council (in fact, the Attorney-General) in England.

(c) *From English Parliament.*—What may be called the external check arose from a claim put forward that the jurisdiction of the Irish Parliament was not exclusive, but that the English Parliament had a concurrent, if not a paramount, right to legislate for Ireland. The claim may have had its origin in the fact that in the times of the Edwards, representatives from Ireland were summoned to the English Parliament. In the reign of Henry iv., in the 29 Hen. vi., and in the Duke of York's Parliament, 1549, the Irish Parliament passed declarations that statutes to be binding in Ireland must be allowed by the Irish Parliament. On the other hand, several statutes were passed in England naming Ireland, the most important of which is the Staple Act (2 Hen. vi. c. 4), by which merchandise of the staple was forbidden to be sent to any port abroad except Calais, where the king's staple was, on pain of forfeiture of the goods. The question came before the English Courts in *Pilkington's case* (Year Book, 26 Hen. vi. f. 8) and in the *Merchants of Waterford's case* (Y. B. Rich. III. f. 12; Y. B. 1 Hen. vii. f. 2). In the former case the judges said that a subsidy granted in England would not bind Ireland, because the Irish did not receive commandment by writ to come to the English Parliament. The *Merchants of Waterford's case* arose upon the Staple Act. The merchants had consigned staple articles to Sluys. The ship put into Calais, and the treasurer of Calais claimed to forfeit the goods. The judges first held that the Irish were not bound by the English statutes, "because the land of Ireland has a Parliament and all other laws of its own, and did not send representatives to the English Parliament." When the matter came on a second time, the judges held that statutes made in England did bind the people of Ireland. In *Calvin's case*, Lord Coke asserted that English statutes were binding on Ireland partly on the ground of conquest, partly on the authority of the *Merchants' case*. In the reign of Charles I. the exclusive authority of the Irish Parliament was reasserted, and one of the articles of impeachment against Strafford was that he had treated Ireland as a conquered country. During the Commonwealth no Parliament was held in Ireland, but in 1654 under the Instrument of Government thirty members from Ireland attended the English Parliament. The Restoration brought back the Irish Parliament, but it was unable or unwilling, owing to various causes which are matter of history, to resist the claim of legislative authority made by its more powerful neighbour. In this reign, in the reign of William III., and in the reign of Anne, several statutes were passed in England expressly binding Ireland (e.g. the Navigation Acts, the Tobacco Acts, the Act nullifying the Acts of James the Second's Irish Parliament, and the Woollen Acts). The interference with trade aroused great indignation in Ireland, and called forth the most celebrated of the treatises that the controversy produced—*Molyneux's Case of Ireland Stated* (1698). So far from receding from its position, the British Parliament continued to legislate for Ireland, and at length passed a statute—the well-known 6 Geo. I. c. 5—declaring Ireland to be a subordinate kingdom, and that the Parliament of Great Britain had full power to make laws to bind the people of Ireland. This statute made the claim of the English Parliament no better than it was, but the Irish Parliament passed no counter declaration. From 1660 until the end of the reign of George II.—a period of a hundred years—Irish legislation was confined to internal matters exclusively. In all matters of foreign trade the Parliament of England, and afterwards of Great Britain, claimed to legislate for Ireland. If an Irish bill was opposed to the policy of the Ministry it could be disposed of very easily: under Poyning's Law the Attorney-General threw it aside. In the British Parliament English and Scotch interests were looked after; Ireland, having no representatives, was treated as a foreign rival in trade. Statutes were passed which destroyed the manufactures and trade of Ireland; Irish ships could not enter a colonial port; colonial ships could not enter an Irish port; Irish cattle could not be imported into England, and Irish wool could be exported to no country but England. The internal legislation of the Irish Parliament led to discontent. It was inevitable that such measures should end in agitation. The events which led to the establishment of partial commercial independence in 1780 and of legislative independence in 1782 are part of the history of Ireland.

V. *Independence of the Irish Parliament.*—The independence of the Irish Parliament in 1782 was effected by three statutes. The British Parliament repealed the 6 Geo. I.

c. 5, *supra* (22 Geo. III. c. 53), and in order to remove the doubts set up by the repeal of the statute, passed, in the following year, the Renunciation Act (23 Geo. III. c. 28), declaring the right of the people of Ireland to be bound only by Acts of the Irish Parliament. These Acts only removed the restrictions arising from the external check—the interference by Great Britain. The measure of independence was incomplete so long as the Irish Parliament was subject to the control of the Privy Councils. Poyning's Law was therefore modified—not repealed as is sometimes stated—by the Irish Parliament. The 21 & 22 Geo. III. Ir. c. 47 enacted that the Lord Lieutenant should certify to the king only such bills as both Houses of Parliament in Ireland should certify to be enacted under the Great Seal of Ireland without alteration; that such of the same as should be returned under the Great Seal of Great Britain without alteration, and none other, should pass in the Parliament of Ireland; and that no bill should be certified as a cause for summoning Parliament. As before, no Parliament could meet without the king's licence.

VI. *Points of Difference in Constitutions and Assimilations.*—Before proceeding to treat of the position of the Irish Parliament as an independent legislature, it will be convenient to consider how far the law and practice of the constitutions of the two countries differed, and to what extent the more important constitutional statutes applied to Ireland.

(a) *Statute Law of Ireland.*—By one of the provisions of Poyning's Law (10 Hen. VII. Ir. c. 22) all the then existing statute law of England was extended to Ireland, and by several statutes passed between that date (1495) and 1782 further assimilations were made. In 1782 by the 21 & 22 Geo. III. c. 48 (Ir.), known as Yelverton's Act, the provisions of a considerable portion of the statute law of England were extended to Ireland. Other Acts of the Irish Parliament between 1782 and 1800 adopted important English statutes. Public Acts of the Imperial Parliament of course bind Ireland unless expressly excluded (as to effect of the Act of Union in extending to Ireland pre-Union English statutes, see *Davies v. Lynch*, 1868, I. R. 4 C. L. 570). Several important constitutional statutes passed between 1495 and 1800 were never extended to Ireland; others only after long intervals and with considerable modifications.

(b) *Meeting of Parliament.*—The English statutes of Edw. II. and Edw. III., enacting that Parliaments should be held yearly, or more frequently if need be, extended to Ireland by Poyning's Law, but were disregarded in practice. From 1585 to 1613, from 1615 to 1634, from 1648 to 1661, and from 1666 to 1692 there was no Parliament in Ireland (the Acts passed by the Parliament of James II. were annulled as illegal). From 1692 to 1782 Parliament met every second year; annual sessions were held from 1782 until the passing of the Act of Union.

(c) *Duration of Parliament.*—Parliament, when summoned, continued to sit during the king's reign unless dissolved. The Parliament of George II. lasted throughout the reign—a period of thirty-three years. The extension of the Septennial Act to Ireland was frequently agitated, but it was not until 1768 that any restriction was placed on the duration of Parliament. In that year the Octennial Act was passed. On account of the biennial sessions, and also owing to fears that inconvenience would arise from General Elections going on in both countries at the same time, an eight years' limit was thought by the Ministry to be more convenient.

(d) *Oaths.*—The Irish Act of Supremacy (2 Eliz. c. 1, s. 7) prescribed that the Oath of Supremacy was to be taken by certain persons. Neither peers nor members of the House of Commons were included. In the Parliament of James I., 1613, there were a hundred and one recusants. In 1661 the House of Commons passed a resolution that the Oath of Supremacy was to be taken by its members. The English Act 3 Will. & Mary, c. 2, imposed new oaths and declarations on members of the Irish Parliament. This statute was not re-enacted in Ireland, but was acted upon by both Houses. Thenceforth Roman Catholics were permanently excluded from the Irish Parliament.

(e) *Placemen.*—It was not until 1793 that pensioners and placemen were excluded from sitting in the House of Commons. In that year the 33 Geo. III. Ir. c. 41 disqualified the holders of offices under the Crown or Lord Lieutenant created after that date. The Statute 41 Geo. III. c. 42 excludes persons disqualified under the Irish Place Bill from sitting in the Imperial Parliament, and extends the disqualification to holders of other Irish offices. Before 1793 a seat was vacated by death, or by the member being made a peer or judge, or taking Holy Orders. After 1793 the Escheatorships of Munster or Ulster were granted by the Lord Lieutenant to members desirous of resigning their seats. These offices corresponded to the Chiltern Hundreds in England, and were used until 1820. They were abolished in 1838.

(f) *Mutiny Act.*—There was no Mutiny Act in Ireland before 1779. The army was governed partly by prerogative and partly on the assumption that the English Mutiny Act applied in Ireland whether there was an express clause in the statute so extending

it or not. In the agitation that arose against English legislation for Ireland it became almost impossible to enforce the provisions of the Mutiny Act. The heads of an Annual Mutiny Bill were returned in 1779 with the limitation as to time struck out. In this form it was passed as a Permanent Mutiny Act. The Act gave great offence in Ireland, and to the Opposition in England. The power given to the Crown to maintain a permanent armed force within the realm was denounced as fraught with danger to the constitution. The Permanent Mutiny Act was repealed in 1782, and Annual Mutiny Acts passed until the Union.

(g) *Money Bills*.—The House of Commons did not acquire control over money bills until 1782. Before that date it was customary that of the bills certified by the Privy Council as one of the causes for summoning Parliament, one at least should be a Bill of Supply. The House of Commons rejected Bills of Supply originated by the Privy Council in the first Parliament after the Revolution, and in the Parliament which met after the passing of the Octennial Act. From 1782 to 1800 the Irish House of Commons possessed the same powers with respect to money bills as the English House of Commons.

(h) *Appropriation and Civil List*.—The principle of appropriation of supplies was not adopted by the Irish Parliament until 1793. At the same time the hereditary revenues were surrendered and a Civil List established. Provision was also made for the gradual reduction of the number of pensions (33 Geo. III. Ir. c. 34).

(i) *Tenure of Judges*.—The provisions of the Act of Settlement and of 1 Geo. III. securing the independence of the judges were adopted by the Irish Parliament in 1782. Judges are to hold office during good conduct, notwithstanding the demise of the king (21 & 22 Geo. III. Ir. c. 50).

(j) *Habeas Corpus*.—The Habeas Corpus Act was extended to Ireland in 1781. The Irish Habeas Corpus Act (21 & 22 Geo. III. c. 11) differs in some particulars from the English Act, and the Lord Lieutenant in Council may suspend the Act in the event of invasion or rebellion.

(k) *Treason*.—The Treasons Acts of Will. III. (7 Will. III. c. 3) and of Anne (7 Anne, c. 21) were introduced into Ireland piecemeal. In 1765 it was enacted that the prisoner must be furnished with a copy of the indictment, and might be defended by counsel (5 Geo. III. Ir. c. 21). The remaining provisions of the Statute of William were extended to Ireland in 1821 (1 & 2 Geo. IV. c. 24) and the Statute of Anne in 1854 (17 & 18 Vict. c. 26) (see *R. v. McCafferty*, 1867, 1 R. 1 C. L. 363). For provision as to trials in Court of Lord High Steward, see *Peerage*, *infra*.

(l) *Religious Liberty*.—Notwithstanding the fact that the Irish Parliament was composed of Protestants, the Penal Laws against Roman Catholics were considerably relaxed before the Union. In 1778 Roman Catholics were permitted to enjoy the property they then held, and to acquire long terms of years. In 1782 they were permitted to acquire freehold interests. In 1792 and 1793 the learned professions, the magistracy, and the army were thrown open to them.

(m) *The Franchise*.—Under the 8 Hen. VI. (1430) the voters in counties were the forty shilling freeholders. Roman Catholics possessing the necessary qualification could vote for members until the Elections Act of the first year of George the Second (1 Geo. II. c. 9). The elective franchise was restored to Roman Catholics in 1793. The boroughs were generally close or nomination boroughs. "Two-thirds of the representatives in this House," said Grattan, speaking in 1793, "are returned by less than a hundred persons." These nomination boroughs were openly sold, leased, settled, and disposed of like other landed property. Each borough returned two members. £7500 compensation was paid for each seat in the eighty-four boroughs suppressed at the passing of the Act of Union: this was about the market value. In the free boroughs—the number is variously estimated—the franchise belonged to the freemen and burgesses.

VII. *Irish Parliament, 1782-1800*.—The independence of the Irish Parliament was merely a legislative independence. After 1782, as before, Parliament had no control over the Executive, which was vested in the Lord Lieutenant and his Chief Secretary. The latter was generally some English member for whom a seat in the Irish House of Commons was obtained. They were at no time regarded as responsible to the Irish Parliament. It is true that on the impeachment of Strafford representatives from Ireland were summoned as "humble assistants"; but the proceeding was anomalous. The Lord Lieutenant and his Secretary were nominees of the English Cabinet. The ministers in Ireland were selected by them from the party in power in the Lower House. But the Lord Lieutenant and Chief Secretary were appointed and recalled without reference to the balance of parties, and without consulting Irish opinion. An adverse vote in Ireland did not affect them. Lord Castlereagh was practically beaten on the introduction of the proposals for Union; but no one expected the Government to resign. Some years earlier a severe vote of censure was passed upon Lord Buckingham; he



retained his office of Lord Lieutenant. There was no fear that an angry House of Commons would give vent to its wrath in the form of an impeachment. "In Ireland there was no *axe*." Not that the procedure was unknown to the constitution, but escape from the jurisdiction brought safety. The Viceroy's were frequently changed, and they had no other connection with Ireland than such as arose from their tenure of office. "You have in this country," said Grattan, "the misfortune of a double administration, a double importunity—a fluctuating Government and a fugacious responsibility."

The Crown of Ireland was distinct from, although inseparably annexed to, the Crown of England. But the king in all foreign matters would naturally act as King of England and not as King of Ireland. The views of England and of Ireland might differ on the expediency of a war, the advisability of a peace, or the wisdom of a commercial treaty. In a division of opinion the wishes of the more powerful country—of "the predominant partner"—would naturally have more weight. The king, as King of Great Britain, acted on the advice of a responsible Cabinet; as King of Ireland on the advice of the Lord Lieutenant and his Secretary, appointed in the manner shown. The exercise of the prerogative would of course bind Ireland, and a war might have been forced upon her detrimental to her interests, and with a people with whom she desired to be on friendly terms. The Irish Parliament was not, however, bound to raise men or money to carry on such a war. No provision was made in the Irish Constitution of 1782–1800 guarding against such a deadlock, or for reconciling differences in case of a conflict of opinion. On three occasions—viz. on the Regency question, on the commercial propositions, and on the dispute with Portugal as to the admission of Irish goods on the same terms as English—serious differences were threatened. That there were not further collisions may be explained by the circumstances of the times. In England there was no change of Ministry from 1783 until after the Act of Union, and Mr. Pitt on several occasions proved that he was desirous of conciliating Irish opinion. In Ireland the two Houses were composed of the same class; in the House of Commons the peers, owing to the possession of the nomination boroughs by the great families, had a commanding influence. It must also be remembered that the Irish Parliament was entirely Protestant. Such independent opposition as tended to exist was "managed by the undertakers" by methods not unknown in the sister Parliament in the last century: bribery and corruption.

VIII. *Union*.—With the political questions associated with the name of "Grattan's Parliament" this article is not concerned. The events which led up to, and the policy which dictated, the Union are matter for political history. The Act of Union (39 & 40 Geo. III. c. 67 and 40 Geo. III. Ir. c. 38) set up one United Kingdom and one Imperial Parliament. The laws and Courts of each kingdom remain as before, except as to House of Lords Appeals (see *Peerage, infra*). The succession of the Crown remains as already settled. The subjects of Great Britain and Ireland are to enjoy the same trading and other privileges. The Act established a fixed proportion for Great Britain and Ireland in contributing towards public expenditure (see Report of Royal Commission on Financial Relations, 1896). Ireland was to be represented in the Imperial Parliament by a hundred (now a hundred and three) members. For provisions as to peers, see *Peerage, infra*; see also *Church, infra*.

The Act of Union made no direct change in the Executive, which still vests in the Lord Lieutenant, assisted by the Privy Council of Ireland. From 1782 to 1800 Irish affairs formed a department of the Home Office, but with the growing importance of the Irish Office the connection has become purely formal. The office of King's Chief Governor under varying names—Governor, Justiciary Lord Deputy, Lord Lieutenant—has existed since the time of Henry II. No action lies against the Lord Lieutenant in an Irish Court for an act done by him in his political capacity (*Luby v. Wodehouse*, 1865, 17 I. C. L. 618; *Sullivan v. Spencer*, 1872, I. R. 6 C. L. 173; *Tandy v. Westmoreland*, 1792, 27 St. Tri. 1246).

[The literature is extensive. Hallam, ch. xviii.; Erskine May, *Constitutional History*; Froude, *English in Ireland*; Lord Mountmorres, *History of the Irish Parliament*; Monck-Mason, *Antiquity and Constitution of the Irish Parliament*; Molyneux, *The Case of Ireland Stated*; Bolton's Tract and Mayart's Tract printed in Harris' *Hibernica*; Lecky, *England in the Eighteenth Century*; Swift's *Works*; Leland's *History*; Ussher, *Parliaments of Ireland*; Davis, *Law Tracts*; Spenser's *View*; Cox, *Anglicana Hibernia*; Ball's *Legislative Systems*; *Debates of the Irish Parliament*; Lynch, *Feudal Dignities*.]



## ALPHABETICAL LIST OF SPECIAL HEADS OF LAW.

*Banks.*—The earliest statute of the Irish Parliament in which “bankers” are mentioned is the 8th of Anne, c. 11: the Act putting promissory notes on the same footing as bills of exchange. The preamble of the 8 Geo. I. c. 14 shows that the trade of the kingdom was carried on mainly by means of bankers’ notes, and in order to secure payment of the same the Act gives a remedy against the real estate of bankers on their simple contracts, and requires all their conveyances to be registered. The 33 Geo. II. c. 14 (Ir.), commonly called the “Bankers Act,” and still unrepealed, introduced more stringent regulations as to registration of conveyances by bankers, and provided for the winding-up of the assets in case of insolvency. By 11 & 12 Geo. III. c. 8 (Ir.)—the first statute extending the bankruptcy code to Ireland—bankers were made liable to the bankruptcy laws (as to these Acts, see *Davies v. Kennedy*, 1868, I. R. 3 Eq. 31; and 668, *ibid.* 1 Eq. 425). In 1781 the Bank of Ireland was established by 21 Geo. III. c. 16 (Ir.), on the same lines as the Bank of England. A similar monopoly was given to the Bank of Ireland. The Act prohibited the establishment in any part of Ireland of joint-stock banks of issue of more than six persons. In 1821 (1 & 2 Geo. IV. c. 72) this prohibition was relaxed. Joint-stock banks of issue were permitted if the shareholders did not reside within fifty miles of Dublin. As fifty miles Irish are nearly equivalent to sixty-five English, the relaxation closely followed that established in favour of joint-stock banks in England. In 1825 (6 Geo. IV. c. 42) persons resident in any part of the United Kingdom might be shareholders in such banks. This statute enabled banking copartnerships of more than six persons to sue and be sued in the name of a public officer. In 1830 (1 Will. IV. c. 32) joint-stock banks of issue were permitted to have agents in Dublin to pay their notes. In 1845 the Bank of Ireland abandoned its monopoly (the more readily because so much of the banking business was in the hands of private banks, *i.e.* of not more than six persons), and joint-stock banks of issue may carry on business in Dublin or any other part of Ireland.

The Bank Charter Act, 7 & 8 Vict. c. 32, s. 10, prohibited any bank from issuing notes, except such banks as were issuing notes on the 6th May 1844. This section applies to the United Kingdom, so that Irish non-issuing banks on that date come within the scope of its provisions. The Irish Bank Act 8 & 9 Vict. c. 37 imposes on banks of issue in Ireland practically the same restrictions as exist in England, *i.e.* beyond the certified limit of issue as determined in the manner prescribed by the Act, the bank must have in hand gold or silver to meet the excess, and returns must be made weekly.

The 7 & 8 Vict. c. 113, an Act to regulate joint-stock banks, was extended to Ireland by 9 & 10 Vict. c. 75, and the subsequent legislation up to and including the Companies Acts included Ireland. The short result is that there exist in Ireland three classes of banks—

I. The Bank of Ireland, which corresponds to the Bank of England. It has several special privileges as being the authorised bankers of certain public moneys, and all payments, transfers, etc., of consols and India stock are entrusted to it.

II. Joint-stock banks, all of which are now registered as limited companies under the Companies Acts. Six of the nine banks are banks of issue.

III. Private banks, *i.e.* banks consisting of not more than ten partners, and regulated by the ordinary law of copartnership and the earlier statutes.

Bank notes may not be issued in Ireland for fractional parts of one pound (8 & 9 Vict. c. 37, s. 15). Bank notes (including Bank of England notes) are not legal tender in Ireland except that Bank of Ireland notes are legal tender in payment of revenue (1. & 2 Geo. IV. c. 72, s. 5). The negotiation, in England of Irish notes under £5 is prohibited (9 Geo. IV. c. 56).

[See BANKERS; BANK OF ENGLAND; Gilbert's *History of Banking*. The position of Irish and Scotch banks in England is fully discussed in Report of Committee on Banks of Issue, 1875. See *Cork Archaeological Journal*, 1894 and 1895, for an interesting series of articles on Irish private bankers.]

*Bankruptcy*.—See BANKRUPTCY; the Bankruptcy (Ireland) Acts, 1857 and 1872, and Kisbey's *Bankruptcy*.

*Charities*.—Charities in Ireland, in the legal acceptance of the term, comprise such charitable uses as are specified in the English Statute 43 Eliz. c. 4, or in the Irish Statute 10 Car. I. sess. 3, c. 1, or such other charitable uses as have been held to be analogous. The 43 Eliz. c. 4 being subsequent to Poyning's Law, did not extend to Ireland. The 10 Car. I. is intitled "An Act for the Maintenance and Execution of Pious Uses." There are differences in the uses enumerated, and at one time it was doubted whether the 10 Car. I. had the effect of extending the English statute to Ireland, but it was subsequently determined that the Irish statute was intended to be "an almost exact pattern of the Statute of Elizabeth" (see *The Incorporated Society v. Richards*, 1841, 1 Dr. & War. 258; 4 I. E. R. 177). "For the purpose of the present case we may deem a charitable purpose in Ireland to be identical with that which (excluding any difference arising from the law of superstitious uses) would be a charitable purpose in England under the 43 Eliz. c. 4" (per Palles, C.B., *A.-G. v. Delaney*, 1876, I. R. 10 C. L. 125). The difference arising from the law of superstitious uses in England and Ireland exists in the case of bequests for masses for the souls of the dead. So long ago as 1823 (*The Commissioners of Charitable Donations and Bequests v. Walsh*, 7 I. E. R. 34) it was decided that such a bequest for the repose of the soul of the testator was not void.

Such bequests for the celebration of private masses have been deemed pious but not charitable, and may therefore be void as creating a perpetuity (*Dillon v. Reilly*, 1876, I. R. 10 Eq. 152; *Robb v. Dorrian*, 1877, I. R. 11 C. L. 292); nor are they exempt from the payment of legacy duty (*A.-G. v. Delaney*, *supra*). *Secus* if the bequest is to be applied for masses to be celebrated publicly (see *A.-G. v. Hall*, 1896, 2 I. R. 291, *infra*).

The 43 Eliz. c. 4 has been repealed and re-enacted by 51 & 52 Vict. c. 42, and the 10 Car. I. sess. 3, c. 1, has been repealed by the Statute Law Revision Act (Ireland), 1878.

The English Mortmain Acts prior to 1495 were extended to Ireland by 10 Hen. VII. c. 22 (Poyning's Law). In Ireland, as in England, no corporation can hold land except under the provisions of an Act of Parliament or by licence from the Crown. The English Statute 7 & 8 Will. III. c. 37, declaratory of the Crown's right to grant such licence, was re-enacted in Ireland (32 Geo. III. c. 31 (Ir.)). The English Mortmain Act (9 Geo. II. c. 36) did not extend to Ireland, and dispositions in mortmain in Ireland are now governed by the 16th section of the Statute 7 & 8 Vict. c. 97. "No donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments for such uses, unless the deed, will, or other instrument containing the same be duly executed three calendar months at least before the death of the person executing the same; and unless every such deed or

instrument not being a will shall be duly registered in the Registry of Deeds Office within three months." The statute does not avoid gifts of money secured by charges on land, even though the legal estate in the mortgage passes under the will to the trustees (*Stewart v. Barton*, 1872, 1 R. 6 Eq. 215; *Muirland v. Perry*, 1879, 3 L. R. I. 135). A devise in trust to sell for a charitable use is void (*Donnellan v. O'Neill*, 1 R. 5 Eq. 531). Pious as well as charitable uses are within the section (*Boyle v. Boyle*, 1877, 1 R. 11 Eq. 433). The 5 & 6 Vict. c. 82, s. 38, exempts from the payment of legacy duty any legacy in support of any charity in Ireland or for any purpose merely charitable. It must appear by the will itself that the charitable purpose is restricted to Ireland (*A.-G. v. Hope*, 1868, 1 R. 2 C. L. 368; *Kenny v. A.-G.*, 1883, 11 L. R. I. 253). Legacies for private masses are not exempt from legacy duty (*A.-G. v. Delaney*, 1875, 1 R. 10 C. L. 104). If the masses are to be celebrated publicly they are a charitable bequest and within the exemption (*A.-G. v. Hall*, 1896, 2 L. R. 291).

The Commissioners of Charitable Donations and Bequests in Ireland have been constituted and their powers defined by the Statutes 7 & 8 Vict. c. 97, 30 & 31 Vict. c. 54, and 34 & 35 Vict. c. 102. The Commissioners are a corporate body; they may sue for charitable funds withheld or misapplied, either in the superior Courts or, in cases of smaller sums, by civil bill. Where the funds do not exceed £300 they may apply them *ex-parte*, or, in any case, they may apply for the approval of the Court. Trust funds may be transferred into the name of the Commissioners, and they are empowered to give advice and direction in matters affecting charities to trustees. They may authorise a change of investments, and may compel charity trustees to complete their number. They may also sanction leases and authorise improvements of trust property. (See further the statutes cited and *Archbold v. Commissioners of Charitable Donations*, 1849, 2 H. L. 440.) The executors or administrators of any will containing any charitable devise or bequest must, within three months after obtaining administration, publish a notice of such charitable devise or bequest once in the *Dublin Gazette* and three times in some local paper.

The 52 Geo. III. c. 101 (Romilly's Act) provides a summary remedy by petition in cases of charities. The petition must receive the fiat of the Attorney-General.

See as to leases to ecclesiastical persons, 18 & 19 Vict. c. 39, and 38 & 39 Vict. c. 42.

As to vesting gifts in the Commissioners of Charitable Donations and Bequests in trust for Roman Catholic ministers in Ireland, see 7 & 8 Vict. c. 97, ss. 15-17.

[Hamilton on *Charities in Ireland*.]

*Companies*.—See COMPANY. The Winding-Up Act, 1890, and Mortgage Debenture Acts do not apply to Ireland.

*Church*.—The fifth article of the Act of Union enacted that there should be one united Church of England and Ireland, and that the doctrine, worship, discipline, and government of the United Church should remain in full force for ever. This also was to be deemed a fundamental article of the Act. The Irish Church Act, 1869, dissolved the union between the Churches. The Church of Ireland ceased to be an established Church, all ecclesiastical Courts were abolished, and all coercive jurisdiction of any ecclesiastical person taken away, and the ecclesiastical law of Ireland, except as to matrimonial causes and matters, ceased to exist as law. All ecclesiastical corporations, sole or aggregate, were dissolved, and all rights

of patronage taken away. The Irish bishops ceased to be appointed by the Crown, and lost their seats as spiritual lords.

The laws prohibiting the holding of Church synods were repealed, and power was given to the clergy and laity to hold meetings for regulation of Church matters and to appoint a body to represent the Church in its corporate capacity, and to hold property for Church purposes; and power was given to the Crown to incorporate such body. The Representative Church Body has been accordingly incorporated by Royal Charter, dated 15th October 1870.

On the passing of the Act the whole property of the Irish Church was vested in the Church Temporalities Commissioners. The Commissioners were a corporate body, and had power to determine all questions arising under the Act. Out of the funds vested in them they were to make compensation for vested interests as prescribed by the Act. Churches, schoolhouses, burial grounds, ecclesiastical residences, and other Church property have been vested by order of the Commissioners in the Representative Church Body (see 47 Vict. c. 10 as to churches of private foundation). The surplus Church funds were to be held by the Commissioners for such purposes as Parliament might hereafter determine. Grants have been made out of the surplus Church funds in favour of intermediate education, national education, etc. By 44 & 45 Vict. c. 71, the Irish Land Commission are the successors and stand in the place of the Commissioners of Church Temporalities.

The ecclesiastical law, and doctrines, rites, rules, discipline, and ordinances of the Church are to be deemed binding on members of the Church as if they had mutually contracted to observe them, subject to such modification as may be prescribed by the constitutions of the Church of Ireland. The Church of Ireland is in the position of a voluntary religious society whose rules and doctrines are binding on the members but cannot be enforced in the temporal Courts unless some right of property is involved (*Long v. Bishop of Capetown*, 1863, 1 Moo. P. C., N. S. 411; *Bishop of Natal v. Gladstone*, 1867, L. R. 3 Eq. 1; *Forbes v. Eden*, 1867, 1 Sc. App. 568).

The Roman Catholic Church exists as a voluntary religious association. The penalties enacted in the 28th section of the Roman Catholic Relief Act, 1829, against Jesuits and members of monastic orders are never enforced, but bequests to such bodies are void (*Sims v. Quinlan*, 1864, 16 I. Ch. R. 191; 17 I. Ch. R. 43; *Walsh v. Walsh*, 1869, 1 R. 4 Eq. 396). As to the position of the Roman Catholic Church in Ireland and as to the legality of Papal ordinances, see *O'Keeffe v. Cardinal Cullen*, 1873, 7 I. C. L. 319.

By the Irish Presbyterian Church Act, 1871, trustees have been incorporated to hold land, notwithstanding the Mortmain Acts, and other property in trust for the Presbyterian Church.

The Statute 34 & 35 Vict. c. 40 enables the Primitive Wesleyan Society of Ireland to appoint trustees in whom real and personal property of the society may be vested for promoting the interests of the society. The Act embodies the doctrines of the society. The discipline, but not the doctrines, of the society may be altered. Therein, probably, it differs from the position of the Church of Ireland under the Irish Church Act.

[*Warren's Law of the Irish Church*; *The Constitutions of the Church of Ireland*; *Ball's History of the Church of Ireland*; *Reid's History of Presbyterian Church in Ireland*.]

*Constabulary and Police*.—The 6 & 7 Will. iv. c. 13 established the

constabulary. The Inspector-General has the powers of a justice of the peace throughout every county in Ireland. Statutory powers are given to him to make regulations for the government of the force. The constabulary may act in any part of Ireland, and additional constabulary may be ordered into any district on the certificate of justices, or when a district is proclaimed, or on the memorial of a town council or town commissioners, or for the prevention of illicit distillation. The expenses of the constabulary are payable out of the Consolidated Fund unless when additional men are required in any place, in which case a moiety of the expense may be charged on the county, city, or town (8 & 9 Vict. c. 46; 9 & 10 Vict. c. 97, s. 3; 17 & 18 Vict. c. 89; 17 & 18 Vict. c. 103, s. 59). The constabulary must attend on justices at petty sessions and Quarter Sessions and execute their warrants. The usual statutory protection is given in executing warrants (6 & 7 Will. iv. c. 36, s. 50). A number of duties are imposed on the constabulary by various Acts of Parliament, *e.g.* under the Contagious Diseases Animals Act, the Weights and Measures Acts, the Parliamentary Elections Acts. The position of the constabulary as a part of the power of the county, whose assistance the sheriff has the right to require in execution of writs, and their relation to the Executive, is fully discussed in *A.-G. v. Kissane*, 1893, 32 L. R. I. 220; see also *Judgments under Criminal Law Amendment (Ireland) Act*, 1887, p. 29; and *The Constabulary Code*. *Miller v. Knox*, 1838, 4 Bing. N. C. 574, may be consulted as to position of constables under earlier Acts. See also Reid's *Constable's Manual*.

The Dublin metropolitan police district is not within the constabulary limits. The Dublin police district is fixed by statute and Orders in Council. The head of the force is the commissioner of police, and the members are governed by special Acts (see 6 & 7 Will. iv. c. 29, and c. 25; 2 & 3 Vict. c. 78; 11 & 12 Vict. c. 113); and special powers are conferred upon them by various statutes (see statutes relating to Dublin police district, and in particular 5 & 6 Vict. c. 24).

As to special constables in Ireland, see the Special Constables (Ireland) Act, 1832; 2 & 3 Will. iv. c. 108. As to watchmen and police in towns and boroughs, see 9 Geo. iv. c. 82, ss. 47 and 48, and the Town Police Clauses Act, 1845, ss. 1-20.

*Debtors.*—See DEBTORS ACT: the Irish Act is 35 & 36 Vict. 57; Kisbey's *Bankruptcy*.

*Courts.*—The Supreme Court of Judicature (Ireland) Act, 1877, established one Supreme Court of Judicature, consisting of all the Superior Courts of law and equity, and the Courts of oyer and terminer and gaol delivery, and of some Courts which did not rank as superior Courts, but had by statute been made principal Courts of record. The latter are: the Court of probate, constituted a Court of record by 20 & 21 Vict. c. 79; the Court for matrimonial causes, created a Court of record by 33 & 34 Vict. c. 110; the Landed Estates Court, the successor of the Court of the Commissioners for the Sale of Encumbered Estates in Ireland, created a Court of record by 12 & 13 Vict. c. 77; and the High Court of Admiralty, created a Court of record by 30 & 31 Vict. c. 114. The Court of Bankruptcy was not originally included in the Supreme Court. The Supreme Court is divided, as in England, into the Court of Appeal and the High Court of Justice. In the Court of Appeal is vested the jurisdiction of the Court of Exchequer Chamber, the greater part of the jurisdiction of the Court of Appeal in Chancery, and also in writs of error. The High Court of Justice originally consisted of five Divisions: Chancery,

Queen's Bench, Common Pleas, Exchequer, Probate and Matrimonial. By the Judicature Act, 1887, the Common Pleas Division was amalgamated with the Queen's Bench; and by the Judicature Act, 1897, the Exchequer was amalgamated with the Queen's Bench Division. By the same Act the Probate, Matrimonial, Admiralty, and Bankruptcy are also administered as part of the Queen's Bench Division.

The Chancery Division consists of the Lord Chancellor (who retains his original jurisdiction in certain matters, principally lunacy and minor matters), the Master of the Rolls, the Vice-Chancellor, and the Land Judge. The matters assigned exclusively to the different Divisions practically follow the English Acts, and the rules of practice have been as far as possible assimilated. The practice in Bankruptcy and in the Land Judges is peculiar to Ireland.

The Court of Appeal consists of certain *ex-officio* judges, two ordinary judges, the Lords Justices of Appeal, and additional judges who have held certain offices and consent to act. The Lord Chancellor is the President of the Court of Appeal.

The jurisdiction in criminal matters of the Court for Crown Cases Reserved (11 & 12 Vict. c. 78) is vested in the judges of the High Court or any five of them, of whom the Chief Justice must be one. No appeal lies on any criminal cause or matter save for error of law apparent upon the record. As to what is a "criminal cause or matter," see *A.-G. v. Kissane*, 1893, 32 L. R. I. 220.

The Court of the Land Commission was erected in 1881. It is not a superior Court, but the judge ranks as a judge of the High Court of Justice. This Court has jurisdiction only in matters arising under the Land Acts. Appeals, in certain cases, lie to the Court of Appeal.

From the decision of the Court of Appeal a further appeal lies to the House of Lords with certain exceptions, *e.g.* Land Commission appeals.

The Civil Bill jurisdiction in Ireland (corresponding to the plaint in the English County Courts) is of great antiquity. A reference was made to the Grand Committee of the Irish House of Commons in 1614 to consider the subject of Civil Bills; and one of the articles of impeachment against Strafford was that he had exercised in the Court of Requests a similar jurisdiction by "Civil or English Bills," in derogation of the course of the common law. Strafford defended himself on the ground that "the natives" were accustomed to the procedure, and that none suffered but the lawyers. The Civil Bill jurisdiction was originally assumed by the going judge of assize, and was established by the Statute 2 Geo. I. c. 11 (Ir.). In 1796 (36 Geo. III. c. 25) the hearing of Civil Bills was transferred from the judges to the "assistant barristers" (now County Court judges). The 56th Geo. III. c. 88, and 6 & 7 Vict. c. 75, further extended the jurisdiction. The principal Acts at present giving jurisdiction are the 14 & 15 Vict. c. 57; 27 & 28 Vict. c. 99; 40 & 41 Vict. c. 56; and 43 & 44 Vict. c. 39. The County Court judge under these Acts has jurisdiction in matters of contract and tort (with some exceptions) up to £50, in ejectments for overholding and for non-payment of rent up to £100, in ejectments on the title where the lands do not exceed £30 in annual value under the General Valuation Acts, in most equity matters and in probate matters up to £500, and in lunacy matters up to £700. In equity matters an appeal lies to the Chancery Division (40 & 41 Vict. c. 56, s. 43), and from the common law side an appeal lies to the judge of assize. The County Court Appeals Act, 1889, gives the right to appeal in equity matters to the judge of assize in addition to the existing right to appeal to the Chancery Division. •

Local Bankruptcy Courts have been established in Belfast and Cork (51 & 52 Vict. c. 44).

The Court of Quarter Sessions is one of the oldest Courts in Ireland. It is presided over by the County Court judge, sitting in his capacity of chairman of the county. The jurisdiction is not restricted by statute to the same extent as in England, but serious crimes are in practice sent to the assizes. This Court has also jurisdiction in licensing cases, appeals from petty sessions, and rating appeals.

The Manor Courts were abolished in 1859, and jurisdiction given to justices in cases of small debts.

For the summary jurisdiction of justices, see 14 & 15 Vict. cc. 92 and 93. As to resident magistrates, see 6 & 7 Will. IV. c. 13; 10 & 11 Vict. c. 100; 16 & 17 Vict. c. 60.

Courts of Conscience are still held in some boroughs. One Court Leet claims to exist.

[Wylie's *Judicature Acts* (Ireland); Carleton's *County Courts* (Ireland); Osborne's *Jurisdiction and Practice of County Courts in Equity*; Molloy's *Justice of the Peace*; Sargent's *Licensing Laws*.]

*Inquisitions*.—See EXEMPLIFICATIONS; LUNACY.

*Judgments*.—The great difference between English and Irish judgments consists in their effect as charges upon land. The Judgment Mortgage (Ireland) Act, 1850, abolished the writ of elegit and all the then existing modes of execution against lands (except the writ of *fi. fa.*) as regards all judgments entered up after the 15th July 1850, or as regards judgments previously entered up as against lands purchased after that date (see *Keay's Estate*, 1869, 1 R. 3 Eq. 659). The older modes of execution are now of little importance and may be shortly dealt with. The Irish Statute of Frauds (7 Will. III. c. 12, s. 7) extended the writ of elegit to equitable interests in one-half the debtor's lands, and Pigot's Act (3 & 4 Vict. c. 105, corresponding to 1 & 2 Vict. c. 110, in England) further extended it to the whole of the lands, and to equitable interests in chattels real. Judgments were more commonly enforced against lands by the appointment of a receiver, either by a plenary suit in Chancery or, after 5 & 6 Will. IV. c. 55 (the Sheriff's Act), on a summary petition. Pigot's Act extended this remedy. See further, as to receivers, *In re McCullagh's Estate*, 1883, 11 L. R. I. 398. The Statute 3 Geo. II. c. 7 (Ir.) provided for docketing judgments, and 9 Geo. IV. c. 55 for re-docketing. The 7 & 8 Vict. c. 90 introduced the registration of judgments, and the 13 & 14 Vict. c. 29 re-registration every five years in the Registry of Judgments Office. Crown bonds, recognisances, inquisitions, judgments at the suit of the Crown, and *lis pendens* must be similarly re-registered every five years (34 & 35 Vict. c. 72). As to the effect of the Re-docketing and Registration Acts, see *McCarthy v. Fermoy*, 1891, 27 L. R. I. 275; *In re Roche's Estate*, 1890, 25 L. R. I. 271; *In re Loughman's Estate*, *ibid.* 515. The nature of judgments under Pigot's Act is fully considered in *Shea v. Moore*, [1894] 1 I. R. 158. As to judgments for sums not exceeding £150 entered up between 1st August 1849 and 15th July 1850, see 12 & 13 Vict. c. 95. Such judgments are not charges on land.

The Statute 13 & 14 Vict. c. 29 (the Judgment Mortgage (Ireland) Act, 1850), introduced the class of securities known as "judgment mortgages." The 6th section enacts that when the judgment creditor, on any judgment entered up after the 15th July 1850, shall know or believe that the judgment debtor is possessed of, or has any disposing power over, lands of any tenure, the judgment creditor may make, and file in the Court in which the judgment has been entered up, an affidavit stating (a) the title of the cause;

(2) the name and the usual or last known place of abode, and the title, trade, or profession, of the plaintiff and of the defendant; (3) the amount of the debt, damages, and costs; (4) the nature of the judgment debtor's interest in the lands; (5) the county and barony or town and parish in which the lands are situate. The creditor on filing an office copy of this affidavit in the Registry of Deeds Office, effects a judgment mortgage under the Act. The judgment debtor's beneficial interest in the lands is transferred to the judgment creditor, as if a mortgage had been duly made and registered at the time of registering the affidavit. The form of affidavit in use after the passing of the Act was defective. The 21 & 22 Vict. c. 115 provided that a supplemental affidavit might be filed before 1st July 1859, with a proviso that an omission to state the fact of seisin or possession or the description of the lands was incurable.

"Creditor" includes corporate bodies and any number of persons jointly interested. "Judgment" includes any decree or order, and orders in lunacy or bankruptcy. The decisions on the necessary averments under sec. 6 have been very numerous. The name of the cause is the name appearing in the body of the judgment (*Wolseley v. Worthington*, 1863, 14 I. Ch. R. 369). After the passing of the Act the requirements as to the statement of the usual or last known place of abode were construed very strictly (*M'Dowell v. Wheatley*, 1858, 7 I. C. L. 562). In *Thorpe v. Broune*, 1867 (L. R. 2 H. L. 220), it was held that a statement which leaves no doubt as to the identity of the person is sufficient. See also *Slator v. Slator*, 1866 (16 I. Ch. R. 488), *Davies v. Kennedy*, 1868 (I. R. 3 Eq. 31, 668), *Spadiccini v. Treacey*, 1888 (21 L. R. I. 553), *In re Edgworth's Estate*, 1860 (11 I. Ch. R. 294).

The earlier decisions as to the statement of the amount of the debt, damages, and costs are scarcely reconcilable with the later. The result of the cases may be summed up as follows: When the judgment gives a precise sum as for damages and costs respectively, such sums must be stated accurately in the affidavit. When the judgment gives a sum for damages, and for costs which are to be afterwards ascertained, the affidavit must carefully distinguish, in inserting these costs, between the amount the judgment is intended to secure and the amount actually awarded. If the costs have not been taxed, and the plaintiff wishes to register before taxation, the affidavit must contain an averment expressly waiving the costs (*In re Fitzgerald's Estate*, 1860, 11 I. Ch. R. 278; *In re Edgworth's Estate*, *ibid.* 293; *In re Hood's Estate*, 1865, 17 I. Ch. 230; *In re Lawler's Estate*, 1867, I. R. 1 Eq. 268; *In re Field's Estate*, 1877, I. R. 11 Eq. 456).

The interests sought to be affected may be either legal or equitable, freehold or chattel, or even a tenancy-at-will (*Devlin v. Kelly*, 1886, 20 I. L. T. R. 76). A judgment may be registered as a mortgage against a debtor's interest as a judgment mortgagee (*Rosboro' v. MacNeill*, 1889, 23 L. R. I. 409). But only actual as distinguished from contingent interests can be the subject-matter of a judgment mortgage (*Rae's Estate*, 1877, 1 L. R. I. 174).

"Disposing power" in the Act means power in the strict legal sense, and does not include the power of a tenant in tail to bar (*Fletcher v. Steele*, 1844, 6 I. Eq. 376), nor the right of a married woman to dispose of her separate estate (*Digby v. Irvine*, 1844, 6 I. Eq. 149).

The county and barony must be stated distinctly, *i.e.* where they lie in more than one, *distinguendo*. As to what will be a sufficient statement the following cases may be consulted: *In re Morrow's Estate*, 1862, 14 I. Ch. R. 44; *In re Earl of Limerick*, 1862, 7 I. Jur. N. S. 65; *McIlroy v. Edgar*, 1881, 7 L. R. I. 521; *Church's Estate*, 1877, 1 L. R. I. 255; *Munster Bank v.*



*Maher*, 1885, 16 L. R. I. 165; *Delacherois v. Heron*, 1887, 21 L. L. T. R. 271; *In re O'Connor's Estate*, [1894] 1 I. R. 408.

By 27 & 28 Vict. c. 99, s. 24, the decree of a County Court for an amount exceeding £20 may be removed into a Superior Court and registered as a judgment mortgage.

A judgment mortgagee is within Locke King's Acts (*Nesbitt v. Lawder*, 1886, 17 L. R. I. 53), and he may also marshal (*In re Lynch*, 1867, 1 I. R. Eq. 396).

A judgment mortgagee has the usual remedies of a mortgagee. He may bring an action for rent due by tenants after notice to pay rent to him, he may institute a suit in Chancery for sale, petition for a receiver, petition for sale in the Land Judges, or bring an ejectment on the title. The remedies may be pursued in the Civil Bill Court when the amount does not exceed £500 and the lands do not exceed £30 in annual value. A judgment mortgage has no priority in bankruptcy unless registered three months before the petition in bankruptcy is filed (Bankruptcy Act, 1857, s. 331). But where there was first an equitable mortgage by deposit, and afterwards a judgment in respect of the debt was registered as a mortgage, and a petition was filed within three months, it was held that, though the judgment mortgage was levelled, the mortgagee was entitled to rely on his prior equitable mortgage (*Elliott's Estate*, 1873, I. R. 8 Eq. 565).

The judgment mortgage is not in some ways a desirable security. If a judgment be registered against a term of years, the creditor may become liable on the covenants as an assignee of the legal interest, and is without the protection afforded by a mortgage by sub-demise.

By the Judgment Mortgage Act, 1850, s. 8, voluntary conveyances made after judgment entered up are void as against the creditor. The Irish Statute of Fraudulent Conveyances, 10 Car. I. sess. 2, c. 3, corresponding to the English Statute 27 Eliz. c. 4, contains the words "charges" and "incumbrances" in sec. 1, and these words have been held to include judgments (*O'Donovan v. Rogers*, 7 I. Ch. R. 1). The 10th section of the same statute, which is similar to the 13th Eliz. c. 5, in England, expressly includes judgments "devised to hinder creditors."

The operation of the writ of *fi. fa.* is not affected by the Judgment Mortgage Act. The sheriff may sell under this writ legal but not equitable interests in terms of years.

A memorandum of satisfaction may be entered, the effect of which is to re-vest in the debtor the legal or other estate affected by the registration (Judgment Mortgage, s. 9, as explained by 21 & 22 Vict. c. 115, s. 5).

The Bankruptcy Act, 1857, s. 336, avoids, as against the assignees in bankruptcy, judgments not registered within twenty-one days in the Registry of Judgments Office. Judgments in Ireland are registered both in the Registry of Judgments and also in the Registry of Deeds or of Title, where lands are intended to be affected.

After the passing of the Act it was held in several cases that a judgment mortgage had the same priority as a registered mortgage under seal. The House of Lords (*Eyre v. McDowell*, 1861, 9 H. L. 619) decided that the effect of the Act is to give the judgment creditor a specific charge over the beneficial interest of the debtor in the lands comprised in the affidavit, instead of, as before the Act, a hanging charge over the whole of the debtor's lands, and that the judgment mortgagee takes subject to prior equitable charges although unregistered.

[*Madden's Registration*; Mr. Monahan's Statement of the Law of Judgments in Ireland, appended to *English and Irish Chancery Report*, 1866.]

*Land Purchase.*—The Land Commission may make advances to tenants to purchase their holdings. The advances are now made by the issue of Guaranteed Land Stock equal in nominal value to the amount of the advance, and bearing interest at  $2\frac{3}{4}$  per cent. A landlord who is merely a limited owner may sell under the Acts. The tenant may be a present or future tenant, a leaseholder, the holder of a fee-farm grant, or even the tenant of a holding excluded under sec. 58 of the Land Act, 1881; he must be in occupation. The Land Commission may advance the whole of the purchase-money; but if the advance exceeds three-quarters of the price agreed upon, a guarantee deposit must be provided. Most usually the landlord agrees that the guarantee deposit shall be retained by the Land Commission out of the purchase-money. The retention of the guarantee deposit may be dispensed with if the Land Commission think the security for the repayment of the advance is sufficient. The guarantee deposit is retained by the Land Commission till one-fifth of the principal has been repaid. It is then paid to the vendor or person entitled. Interest is paid in the meantime on the deposit at the rate of  $2\frac{3}{4}$  per cent. The advance is repaid to the Land Commission by an annuity charged on the lands. This annuity discharges both principal and interest, and has priority to all estates and incumbrances except quit rent, head rent, tithes, and drainage improvement charges. While the holding is subject to the annuity, the Land Commission has the powers of a mortgagee, and may also sell the holding if the tenant sub-lets, sub-divides, or becomes bankrupt. The guarantee deposit may, in the ultimate resort, be applied to make good any loss sustained by the purchaser's failure to pay the instalments. Formerly the sale might have been carried out by conveyance or vesting order; since 1891, always by vesting order, unless otherwise ordered. A conveyance required the consent of, and must have been executed by, all incumbrancers, and the purchaser obtained only such title as the grantor in the conveyance had. The vesting order operates independently of the consent of all chargeants, and, like a Land Judge's conveyance, vests the lands in the purchaser discharged from incumbrances, which are transferred to the purchase-money. Existing rights in the nature of easements continue to affect the lands, unless otherwise expressed in the vesting order. By the Land Act, 1896, the fiat of the Land Commission may take the place of a vesting order. The vesting order or other conveyance must be registered under the Local Registration of Title Act, 1891, and the land continues liable to compulsory registration so long as the annuity is payable to the Land Commission. The purchaser's interest is deemed to be a graft upon his previous interest. The estate is not converted into realty. The Land Commission has the powers of the Land Judge to apportion or redeem rents and charges, and also to extinguish all superior interests.

The Land Commission may purchase an estate for purpose of re-sale to the tenants if satisfied that four-fifths in number and value of the holdings will be purchased by the tenants. The Commission may also make advances to tenants who wish to purchase their holdings when an estate is being sold by the Land Judge (Land Act, 1885, s. 4). Where the Land Judge has made an absolute order for sale of an agricultural or pastoral estate which is insolvent, or over which a receiver has been appointed, there must be a first offer to sell their holdings to the occupying tenants under the Land Purchase Acts (Land Act, 1896, s. 40; *Owen's Estate*, [1897] 1 I. R. 186).

The history of land purchase in Ireland commences with the Bright Clauses of the Land Act, 1870. The Board of Works was empowered to

advance money to tenants desirous of purchasing their holdings. The Land Act, 1881, constituted the Land Commission with large powers, partly judicial, partly of an administrative character. Under this Act the limit of an advance was three-fourths of the purchase-money. The Land Act, 1885 (commonly called the Ashbourne Act), was the first really successful measure. The whole purchase-money might be advanced if provision were made for the lodgment or retention of a guarantee deposit, and the sale might be carried out by a vesting order. Amending statutes have been passed 1887, 1888, 1891, and 1896; the Land Purchase Code comprises ten Acts or parts of Acts. The object of the 40th section of the Land Act, 1896, *supra*, is to relieve the block in the Land Judge's Court. The Land Judge's conveyance gives an indefeasible title; and in a Court possessed of such large powers the proceedings are necessarily elaborate, and the notices which must be served in order to preserve the rights of adjoining owners, tenants, etc., are costly. When a petition is presented for the sale of an incumbered estate, a receiver is appointed, and expensive preparations are made for a sale which no one expects to take place. The auction is adjourned *sine die* for want of bidders, and the Land Judge's Court is burdened with the management of the estate, through the receiver. Instead of being a Court for the sale of incumbered estates, it has become a department for collecting rents. In the present state of the land market in Ireland, the tenants are the only persons likely to purchase. The 40th section is intended to make the offer of sale to them compulsory.

[Cherry and Wakely's *Land Acts*; Barton and Cherry's *Land Act*, 1896; MacCarthy's *Land Purchase Cases*; Greer's *Land Cases*.]

*Land Tenure and Estates*.—The English tenures were gradually extended to the districts outside the English Pale by the inclusion of portions of the land subject to the custom of "Irishry" under the name of "Shire land." Where there was a sheriff and county or "Shire ground," the king's writ ran and the common law could be executed (Davies, 104). No statute was needed, as the Crown claimed in Ireland the prerogative of creating counties. In three of the provinces the extension of the English system of tenures was gradual. Sometimes, however, the "custom of Englishry" was extended to clans, and the Statute 12 Eliz. c. 4 empowered the Crown to receive surrenders of lands from "the pretended lords, gentlemen, and freeholders of the Irishry, and the men of degenerate English name," in order that such lands might be re-granted, to hold under the common law. The introduction of the English system into the province of Ulster was principally owing to the plantation grants to private settlers and companies in the reign of James I.

The "case of gavelkind," 1606 (Davies' (R. 134) *Case of Gavelkind and Tanistry*), put an end to the descent of lands by what has been called the "Irish custom of gavelkind," viz. the division, on the death of a tenant, of the lands of the sept among the heads of families, without distinction between legitimate and illegitimate issue. In the reign of James I. it came to be regarded as finally settled that all lands are held of the Crown, and the assimilation of the laws of England and Ireland as regards tenures and estates may be said to date from that period. The old customs to some extent still survived, and in the West of Ireland there still exists the holding in Rundale: a division of the arable lands annually, the pasture being held in common. In Ireland the Crown claimed the right to create manors notwithstanding the Statute *Quia Emptores*; but doubts having been raised as to the validity of these grants, they were confirmed by statute (*Delacherois v. Delacherois*, 1865, 11 H. L. 62; see also *Co. Litt.*

98 b; 2 *Inst.* 501). Manor Courts and manorial rights are of frequent occurrence in the Irish statutes. Quit rents and Crown rents are still of importance, especially in the administration of the Lands Purchase Acts, and the Crown's right to recover such rents is not barred by the 48 Geo. III. c. 47, or the Nullum Tempus (Ireland) Act, 39 & 40 Vict. c. 47 (*Maxwell's Estate*, 1891, 28 L. R. I. 356). The Irish Statute of Tenures (14 Ch. II. c. 19) followed the English Act (12 Ch. II. c. 24); knight's tenure was converted into socage, with similar savings in favour of copyhold, the honorary services of grand serjeanty and frankalmoign. There is, however, no copyhold in Ireland, no estate held by honorary services of grand serjeanty, and the last traces of frankalmoign disappeared with the disestablishment of the Church. Gavelkind existed for a time by virtue of the Statute 2nd Anne, c. 6 (Ir.) (for the prevention of the growth of Popery), whereby the lands of Papists were gavelled.

The legislation as to estates tail closely followed the English Acts, and the Irish Act for the abolition of fines and recoveries (4 & 5 Will. IV. c. 92) differs from the English statute (3 & 4 Will. IV.) only in minor particulars.

Estates *pur autre vie* are very common in Ireland. At one time leases, for lives, renewable for ever, "extended over one-seventh of the country." The estate is merely a descendible freehold, and not an estate of inheritance; dower and curtesy do not attach. On the dropping of the last life it becomes at law a tenancy at will, which the payment of rent will convert into a yearly tenancy. The tenant could in equity enforce the right to renewal: a right recognised by the Tenantry Act (19 & 20 Geo. III. c. 30 (Ir.)). Such tenants were impeachable for waste. The inconveniences of this form of tenure led to the passing of the Renewable Leasehold Conversion Act, 1850 (12 & 13 Vict. c. 105), which "provides for the transfer of the fee from the landlord to the tenant; but qualifies and controls the operation of the statutory grant so as to preserve, as far as possible, to the landlord the legal incidents annexed to his former estate" (per Blackburne, C., *Gore v. O'Grady*, 1867, I. R. 1 Eq. 8). Any tenant holding for lives or years determinable on lives or years absolute, with a covenant for perpetual renewal, may compel the landlord to execute a fee-farm grant. The fee-farm rent is the rent reserved in the original lease and not the renewal, increased according to a scale fixed in the Act based on the fines payable for renewal. The rent is recoverable by the usual remedies as between landlord and tenant. A fee-farm grant executed to a tenant in possession of a renewable leasehold quasi in tail will bar the entail (see further, 7 Will. III. c. 12 (Ir.); *Morris v. Morris*, 1872, I. R. 7 C. L. 295; *Batteste v. Maunsel*, 1876, I. R. 10 Eq. 314; *Allen v. Allen*, 1842, 2 Dr. & War. 307). A covenant in the lease against alienation will not be inserted in the fee-farm grant, as being repugnant to an estate in fee-simple. When the lease is converted after marriage, the fee acquired does not become subject to dower or curtesy (s. 9). But when lands already converted into a fee-farm grant are purchased, they are subject to dower or curtesy although the conversion took place after the date of the marriage of the deceased (*Robins v. M'Donnell*, 1879, 3 L. R. I. 391). A sub-lessee in perpetuity may obtain a subfee-farm grant under the Act.

Fee-farm grants at common law were not uncommon in Ireland. The rent reserved could only operate as a rent-charge, there being no tenure. Such grants, if made after the 1st January 1861, may set up the relation of landlord and tenant, if such be the intention of the parties. The distinction between common law fee-farm grants, fee-farm grants made in pursuance of the Renewable Leasehold Conversion Act, 1850, and fee-farm

grants made since 1st January 1861, not under the provisions of the statute last cited, is of great importance (see *Landlord and Tenant*; *Kelly v. Ratley*, *infra*).

Leases were frequently made for lives determinable on years, or for years determinable on lives. The "Shelburne Lease" was a lease of the latter class; for ninety-nine years determinable on three lives, with a covenant for perpetual renewal. It was devised in favour of Roman Catholics, who were prohibited by the penal laws from taking freehold interests.

A tenancy at will cannot be created in an agricultural or pastoral holding. The Land Act, 1870, provides (s. 69) that such tenancies created after the passing of the Act shall be determined by the usual notice to quit. A tenancy for a year certain in such holdings is deemed to be a tenancy from year to year (Land Act, 1881, s. 15).

Conacre—a mode of dealing with lands peculiar to Ireland—is frequently mentioned in the statutes. It is not a letting of the lands, but a mere licence to take a crop off the lands. There are two varieties of conacre: one where the owner permits the land to be tilled, the other where before doing so he prepares and manures the land at his own expense. In either case he retains dominion over both the land and the crop. The crop planted by the conacre holder cannot be removed until it is paid for (*Booth v. MacManus*, 1861, 12 I. C. L. R. 435; *Dease v. O'Reilly*, 1845, 8 I. L. R. 52).

The modes of creating and transferring estates have practically followed those existing in England, and the English Conveyancing Acts were re-enacted by the Irish Parliament. The Statutes of Uses, of Inrolments, of Wills, of Fraudulent Conveyances, etc., were re-enacted by Strafford's Parliament, 10 Chas. I., and the Irish Statute of Frauds reproduced the English Act with differences rather of arrangement than of substance. Some variations in the forms of conveyancing might be collected, *e.g.* the English Act of 1841, making the release as effectual as the lease and release, was anticipated by the 9 Geo. II. c. 5 (Ir.), and in Ireland the livery of seisin—the "conveyance by sod and twig"—seized hold of the popular imagination owing to the comparatively frequent creation of freehold interests. The post-Union Real Property Statutes generally extend to Ireland. The practice of conveyancing has been essentially modified by the system of registration which has existed since 1708. See *Registration*.

*Landlord and Tenant*.—The law of landlord and tenant in Ireland was consolidated by the Act of 1860 (23 & 24 Vict. c. 154, commonly called Deasy's Act). The relation of landlord and tenant is deemed to be founded on the express or implied contract of the parties and not upon tenure, nor is any reversion necessary to the existence of the relation. In this respect, however, the Act is not retrospective (*Chute v. Busteed*, 1865, 16 I. C. L. R. 222). Any letting longer than from year to year must be by deed or note in writing. The statute declares and amends the substantive law of landlord and tenant, and regulates procedure in the different classes of ejectment, etc. Deasy's Act is a general Act applying not only to agricultural holdings but also to lettings in towns.

The Act of 1870 (33 & 34 Vict. c. 46) is the earliest of the Land Law Acts. It applies to agricultural or pastoral holdings with certain exceptions: mainly those reappearing in the Act of 1881, and which will be more conveniently dealt with under that statute. The Act had three principal objects—(1) to secure the tenant from arbitrary eviction by compelling the landlord to pay compensation for disturbance according to a fixed scale (now amended, Act of 1881, s. 6); (2) to secure to the tenant the benefit of his

improvements; and (3) to legalise the usages known as the Ulster custom, and analogous usages existing in other parts of Ireland. The tenant might claim under the custom instead of under the "disturbance" and "improvements" sections, if more beneficial to him. The essentials of the Ulster custom are the right to sell, to have the incoming tenant, if there be no reasonable objection to him, recognised by the landlord, and to have a sum of money paid for the interest and tenancy transferred. The Ulster custom varies in different localities, and practically it may be described as the usages shown to prevail on the estate (*M'Elroy v. Brooke*, 1885, 16 L. R. I. 46). The provisions of the Act as to improvements are complicated, and attained considerable importance in administering the Act of 1881. Sec. 8 (9) of the latter Act enacted that, in fixing fair rents, no rent should be allowed in respect of improvements made by the tenant. The Courts held that the statutes being *in pari materia* the tenant's claim for exemption from the payment of rent was merely correlative to a claim for compensation under the Act of 1870 (*Adams v. Dunseath*, 1882, 10 L. R. I. 109). The Land Act, 1896, s. 1, largely alters the law in favour of the tenant, as regards his improvements, in respect of the fixing of fair rents.

The Land Act, 1881 (44 & 45 Vict. c. 49), adopted the principle of the "three F's," viz. fair rent, fixity of tenure, and free sale. Like the Act of 1870, it applies to agricultural or pastoral holdings only, with the exceptions specified in sec. 58, as modified by the Land Act, 1896, s. 5. In order to enjoy the full benefits of the Act the tenancy must be a present tenancy. Present tenancies are those existing at the date of the passing of the Act (22nd August 1881) or tenancies created between that date and the 1st January 1883, in holdings in which tenancies existed at the date of the passing of the Act. A tenancy created after the 22nd August 1881, where there was no tenancy existing on that day, and a tenancy created after the 1st January 1883, whether a tenancy was previously existing or not, is a future tenancy. Every tenancy to which the Act applies is presumed to be a present tenancy (and see Land Act, 1896, s. 3). The tenant must be in occupation working the farm with a view to profit. Middlemen are therefore excluded, as are also tenants who have sublet without the consent of the landlord. The tenants of a middleman may, however, have a fair rent fixed as against him. If the interest of the middleman ceases or is determined by eviction, his tenants become tenants of the superior landlord on the same terms (Land Act, 1881, s. 16; Land Act, 1896, s. 12). Further, if the rents payable by his tenants are reduced by the Courts below the amount payable by the middleman to the superior landlord, he may surrender (Land Act, 1887, s. 8). The prohibition of subletting was very stringent in the Act of 1881, but the penalties attaching to subletting without consent have been somewhat relaxed by the later statutes (Land Act, 1887, s. 4; Land Act, 1896, s. 7).

Leases, when the Land Act of 1881 was passed, were assumed to be "out of the range of practical politics." The 21st section enacted that existing leases were to remain in force as if the Act had not passed, with a proviso that with regard to such leases as should expire within sixty years after the passing of the Act the leaseholders, if *bond fide* in occupation, should be deemed to be tenants of a present ordinary tenancy. The Land Act, 1887, s. 1, enabled leaseholders where the unexpired residue of the term does not exceed ninety-nine years, counting from the date of the passing of the Land Act of 1881, to apply to the Court to be deemed present tenants, and to have a fair rent fixed. The tenant must, however, be *bond fide* in occupation, and the lease must have been in existence on the

22nd August 1881 (see *Moylan v. Finch*, 1891, 28 L. R. I. 332, 595; *Wright and Tittle's Contract*, 1892, 29 L. R. I. 111, as to such leases).

Under the Redemption of Rent Act, 1891 (54 & 55 Vict. c. 57), leaseholders whose leases do not expire within the period defined by the Land Act, 1887, and grantees of fee-farm grants, may apply to redeem their rents under the Land Purchase Acts. If the landlord does not consent, the lessee or grantee may be deemed to be a present tenant and have a fair rent fixed. The Courts held that rents could be redeemed under this Act only where the relation of landlord and tenant existed, *e.g.* grantees of common law fee-farm grants made before 1st January 1861 (Deasy's Act) were excluded (*Kelly v. Rattey*, 1893, 32 L. R. I. 445). The Land Act, 1896, s. 14, enables grantees of such fee-farm grants to redeem their rents.

The holdings specially excepted by the Land Act, 1881, s. 58 (as amended by the Land Act, 1896, s. 5), are—

(1) "Residential holdings," *i.e.* where the main object of the letting was for a residence, and not with a view to profit in agriculture.

(2) Demesne lands: lands forming part of a landlord's demesne and let under circumstances showing that the landlord intended to resume possession of them.

(3) Home farms, *viz.* lettings for the advantage of, and to be used in connection with, a residence and not for profit.

(4) Town parks, *i.e.* lettings near a town bearing an increased value as *accommodation* land, and occupied by a person living in the town. A town park may, however, be included in the Acts if it is let and used as an ordinary agricultural or pastoral farm, and if the fixing of a fair rent upon it will not interfere with the development of the town (Land Act, 1887, s. 9; Land Act, 1896, s. 6).

(5) Pasture farms of the rateable value of upwards of £100; and pasture farms of whatever value on which the tenant does not reside unless they are used immediately in connection with his holding.

(6) Conacre and grazing lettings, labourers' holdings, lettings for temporary convenience so expressed in writing, small cottage allotments and glebe lands. Tenants of demesne lands, town parks, and pasture farms are not, however, debarred from claiming for improvements (Land Act, 1870, s. 15).

Assuming the holding to be within the operation of the Acts, a judicial rent may be fixed in any of the following ways—(1) by agreement filed in Court; (2) by application to the Court; (3) by arbitration; (4) by demand of an increased rent acceded to by the tenant. The fixing of the judicial or fair rent creates a statutory term of fifteen years during which the rent cannot be increased, and the tenant obtains in a certain degree fixity of tenure. He cannot be evicted save for breach of one of the six statutory conditions. These are that the tenant shall pay his rent, shall not commit persistent waste, sublet, become bankrupt, obstruct the landlord in the exercise of certain specified rights, or open a public-house without his landlord's consent (Land Act, 1881, s. 5). If a tenant is evicted for breach of one of the statutory conditions, he forfeits all claim to compensation for disturbance. He may, however, sell his interest, but the holding is penalised in the hands of the purchaser, as a fair rent cannot be fixed upon it. In effect it becomes a future tenancy.

The tenant may sell, but he must first give notice to his landlord, who has a right of pre-emption. If they cannot agree upon the price, the Court will fix it. If the landlord does not wish to exercise his right of pre-emption, the tenant may sell for the best price he can get. The landlord



may object to the purchaser on reasonable grounds, and any claims of the landlord form a charge upon the purchase-money (Land Act, 1881, s. 1).

A tenant, the aggregate of whose holdings amounts to £150 in annual value, may contract himself out of the Acts. Any tenant may exclude the operation of the Acts by the acceptance of a "judicial lease," or by agreeing that his tenancy shall become a "fixed tenancy." A "judicial lease" is a lease for a term of not less than thirty-one years on terms agreed upon and sanctioned by the Court. A fixed tenancy is subject to such terms as may be agreed upon. The rent, however, must be a fee-farm rent, subject to revaluation at certain periods not less than fifteen years, and the tenant shall be liable to eviction only for breach of one of the statutory conditions.

[Cherry and Wakely's *Irish Land Acts*; Barton and Cherry's *Land Act*, 1896; De Moleyn's *Landowner's Guide*; Greer's *Land Cases*; MacDevitt's *Land Cases*; Report of the Select Committee on Irish Land Acts, 1894, in particular the evidence of Lord Justice Fitzgibbon; Furlong's *Landlord and Tenant*.]

*Peerage*.—The Irish peerage closely resembled the peerage of England and the procedure and orders of the Irish House of Lords prior to the Act of Union followed those observed in England. Peers in Ireland could, however, not only vote by proxy but also protest by proxy. Peers were tried before the House of Lords for treasons and felonies. Instances of such trials were that of Viscount Neterville in 1743, and that of Lord Santry near the same period. The latter was tried in the Court of the Lord High Steward. In 1773 the provisions of the Treasons Act (7 Will. III. c. 3) as to summoning all the peers to the Court of the Lord High Steward in cases of treason were extended to Ireland. In 1641 Bishop Bramhall, Sir Richard Bolton, and others were impeached by the Irish House of Commons before the Irish House of Lords. Appeals from the Irish Courts were also heard by the Irish House of Lords, but the English House of Lords also claimed jurisdiction to hear appeals from Ireland. On one occasion an appeal was carried to both Houses, and the judgments disagreed. The Irish judges declared that the decision of the House of Lords in Ireland must prevail (*Annesley v. Sherlock*, 1719, MacQueen, App. v.; Lecky's *England*, ii. 419). The Statute 6 Geo. I. c. 5 was passed by the English Parliament declaring that the English House of Lords was the ultimate tribunal for Irish suits. This Act was repealed by 22 Geo. III. c. 53, and, in order to remove the doubts set up by the repealing statute, the 23 Geo. III. c. 28 expressly declared that no appeal or writ of error from any Court in Ireland should for the future be brought into any Court in England. Thenceforth, till the Act of Union, the right of hearing appeals vested solely in the Irish House of Lords.

By the Act of Union Ireland was to be represented in the Imperial Parliament by four spiritual and twenty-eight temporal peers. Irish non-representative peers may sit in the House of Commons for any constituency in Great Britain, but not in Ireland. While so serving, an Irish peer cannot be elected a representative peer, and loses his privilege of peerage. As often as three peerages become extinct one may be created. The number must always be kept up to one hundred over and above such as become hereditary peers of the United Kingdom. The Irish peers enjoy all the privileges of peers as fully as the peers of Great Britain, except those depending on sitting in the House of Lords; and the lords of Parliament on the part of Ireland have the same privileges as those of Great Britain. The representative peers for Ireland (unlike the Scotch elective peers) sit for life. They are elected in the manner prescribed by the Act



of Union, as amended by 20 & 21 Vict. c. 33, and 45 & 46 Vict. c. 26. The Lord Chancellor, on receiving a certificate from two temporal peers certifying the decease of a representative peer, directs a writ under the Great Seal to be issued to the Lord Chancellor of Ireland. The Clerk of the Crown and Hanaper then causes writs to be issued to every peer of Ireland. Notice must be published in the *London* and *Dublin Gazettes* of the issuing of such writs. Within thirty days of the teste of the writ, the votes must be returned to the Clerk of the Crown and Hanaper. The votes are in duplicate: one part is retained in the Crown Office in Ireland, and the other certified to the Clerk of Parliament. The peers, before voting, must take the oath of allegiance, and a certificate must be annexed to the writ that the oath was duly taken. As to the persons before whom the oath may be taken, see the statutes cited, *supra*.

The Irish Church Act, 1869 (32 & 33 Vict. c. 42, s. 13), deprived the bishops of the right to sit in the House of Lords. The bishops sat according to a rotation fixed by the Irish Act of Union.

*Railways*.—See RAILWAYS; see also Tramway (Ireland) Acts, 1860–1891; for Light Railways, Ireland, 52 & 53 Vict. c. 66.

*Registration*.—There are two systems of registration affecting land: one of assurances, the other of title. Registration of deeds and assurances, as distinguished from registration of title, is governed by the Statute 6 Anne, c. 2 (Ir.). This statute established one public office (the Registry of Deeds) for registering deeds, conveyances, and wills affecting land. Registration is voluntary; “at the election of the party or parties concerned.” Every conveyance, a memorial of which has been registered, shall be effectual according to the priority of time of registration, according to the right, title, and interest of the party conveying, against every other deed affecting the lands comprised in the memorial (s. 4). Every conveyance not registered of any lands comprised in a deed of which a memorial has been registered is deemed fraudulent and void against a deed so registered, and also against judgment creditors. The memorial, which must be on parchment, ought to contain the date of the conveyance, the names and additions of all parties and witnesses (in the body of the memorial), and the local description of the lands (s. 7). The county and barony, or town and parish, must be stated (2 & 3 Will. iv. c. 87, s. 29; but see *Gardiner v. Blessinton*, 1850, 1 I. Ch. R. 79, 85). In practice the memorial states the contents of the deed more fully, *e.g.* the consideration is set forth. There is some advantage in doing so, as the memorial may become secondary evidence. A variance between the deed and the memorial in particulars declared to be essential renders the registration invalid (and see *Butler v. Gilbert*, 1890, 25 L. R. I. 230).

When the memorial omits any additional charge contained in the deed the registration is invalid (*Macnamara v. Darcy*, 1891, 27 L. R. I. 414). Clerical errors will not avoid the registration unless they are calculated to mislead (*Slator v. S.*, 1866, 16 I. Ch. R. 480). The result of the cases is that any variance which would mislead an innocent purchaser is fatal. The memorial in the case of deeds and conveyances must be under the hand and seal of some or one of the grantors or grantees, and attested by two witnesses, one of whom must be one of the witnesses to the execution of the deed. A deed cannot be registered unless one of the witnesses to the deed can be obtained as a witness to the memorial. The memorial of wills is prepared in a different manner, but wills are seldom registered, as the fifth section, making unregistered deeds and conveyances fraudulent, is silent as to wills. The witness to the execution of the memorial and of the deed—“the double witness”—must prove by affidavit the signing and sealing of the memorial,

and the execution of the conveyance mentioned in the memorial. When the lands are situate in county Dublin, the affidavit must be, in other cases it may be, made before the registrar. When the lands are situate elsewhere in Ireland, the affidavit may be made before a commissioner. As to deeds affecting lands in Ireland executed in Great Britain, see 3 Geo. IV. c. 116; executed in the colonies or places out of Her Majesty's dominions, see 16 & 17 Vict. c. 78; 30 & 31 Vict. c. 44. For form of memorials when more instruments than one are used for perfecting the conveyance, see 6 Anne, c. 2, s. 15. It is the execution by the grantor which ought to be attested. Registration of a mortgage upon an affidavit verifying execution by the mortgagee only is defective (*In re Hurley*, 1894, 1 I. R. 488; *Stephen's Estate*, 1875, 1 R. 10 Eq. 282; *Rennick v. Armstrong*, 1819, 1 Hud. & B. 727).

The instruments capable of registration are deeds, conveyances, and wills affecting land in Ireland. Leases not exceeding twenty-one years, where possession goes with the lease, do not lose priority by non-registration (s. 14). In practice such leases are registered, as they may gain priority by registration (*Talbot v. Culmartin*, 1850, 3 I. Jur. 171). With this exception, all other conveyances affecting lands, whether voluntary or for value, legal or equitable, assignments of money charged on lands, and annuities payable out of rents, ought to be registered. Writings not under seal may be registered (*In re Hamilton*, 1859, 9 I. Ch. 512). But there must be some dealing with land coming within the description "deed, will, or conveyance." Assignments by operation of law cannot be registered, nor sheriff's assignment under *fi. fa.*, nor solicitor's lien, nor equitable mortgage by deposit of title-deeds, without any memorandum (*In re Burke's Estate*, *infra*). Charging orders and vesting orders may be registered.

Registration is usually effected by the grantee, but any person having sufficient interest, *e.g.* an assignee, a partial assignee, or personal representative of grantee, may register (*Murphy v. Leader*, 1841, 4 I. L. R. 139, 142; and 8 Geo. I. c. 15 (Ir.)). The assignee cannot gain priority by registering merely the assignment to himself, but may probably gain priority by registration of the conveyance to his assignor.

An unregistered deed is only avoided in favour of purchasers. It may be good as against the grantor or his assignees in bankruptcy, so far as it does not interfere with interests created by a registered instrument.

Registration does not give any additional validity to a deed, *e.g.* it did not, prior to the Voluntary Conveyances Act, 1893, give priority to a voluntary conveyance over an unregistered deed for value.

As to the duty of trustees to register, see *Macnamara v. Carey*, 1 R. 1 Eq. 9).

Provision has been made for entering a memorandum of satisfaction of mortgages (8 Anne, c. 10, s. 3).

**Priorities under Registry Acts.**—A registered deed takes priority over a prior unregistered instrument affecting the same lands irrespective of their dates. The question of legal or equitable estate is immaterial; as is also the question whether the conveyances were made by the same grantor, provided there is no defect in the title of the grantor other than that arising from the existence of the prior unregistered instrument (*Warburton v. Irie*, 1824, Smi. & Bat. 134 K. B.; 1828, 1 Hud. & B. Ex. Ch.; 1832, 2 Dow & C. 480; 6 Bli. N. S. 1 H. L.). Registration gives no priority where the title of the grantor in the registered conveyance is bad (*O'Connor v. Stephens*, 1862, 13 I. C. L. 63). Registration gave, prior to 1893, no priority to a voluntary conveyance, while volunteers only claimed under it (*In re Flood*, 13 I. Ch. 312; *In re M'Donagh's Estate*, 1879, 13 I. L. T. R. 170).

Registered conveyances *inter se* rank strictly by date of registration. A party affected with actual notice cannot in equity rely on his statutory priority. An equitable mortgagee by deposit of title-deeds, accompanied by a memorandum, will be postponed if the memorandum is not registered (*Agra Bank v. Barry*, 1874, L. R. 7 H. L. 135). *Secus* if there be a bare deposit of title-deeds, inasmuch as there is no instrument capable of registration (*In re Burke's Estate*, 1881, 7 L. R. I. 57; 9 L. R. I. 24). Registration gives priority, but does not amount to notice. Tacking has no application to registered instruments.

Registration of title was introduced in 1865. The Record of Title Office was established by 28 & 29 Vict. c. 88, under the control of the Landed Estates Court. Only Landed Estates Court conveyances were recorded, and such conveyances were placed in the record as a matter of course, unless a requisition to the contrary was served. On the record of title appeared not only conveyances but also all devolutions by operation of law. A memorial specifying that the lands were "recorded" was registered in the Registry of Deeds, and thenceforth such lands were removed from the operation of the Registry Acts. A recorded owner, with the consent of all chargeants, might close the record, and the lands were then remitted to the Registry of Deeds. The Act did not prove a success, and the record of title was closed by the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66). Where there is any dealing with recorded land after 1st January 1892, the record must be closed and the lands registered under the Act of 1891. "Dealing with land" includes vesting orders (*Carrige v. M'Donnell's Contract*, 1895, 1 I. R. 288, 296). The Local Registration of Title Act establishes a central registry and a local registry in each county. Two classes of owners may be registered—(1) full owners, *i.e.* in fee-simple; (2) limited owners, *i.e.* of settled land. In the latter case the names of trustees are also registered. Trusts affecting the owner are valid, and trustees, although not trustees for sale, may be registered as owners (*In re O'Doherty*, 1894, 1 I. R. 59). Provision is made for a separate registry of leaseholds, and also for subsidiary registers, *i.e.* not of ownership but of rights affecting land. Registration is compulsory in the case of lands purchased under the Land Purchase Acts (see *In re Keogh*, 1896, 1 I. R. 285) where money is due to the State; voluntary in all other cases. Lands registered under the Act are removed from the operation of the Registry of Deeds (with exceptions as to leaseholds) on filing a memorial in the Registry of Deeds. When registration is voluntary the owner may remit the lands to the Registry of Deeds on filing a memorial.

On first registration the owner may have his title investigated and start with a clear title to the fee. If he does not do so, and the doctrine of graft applies to his interest, a note is made to the effect that the registration is subject to equities. Registered land must be transferred in the manner prescribed by the rules. An assignment by deed passes no interest till registration, but a devise operates before registration to pass the beneficial interest (*Torish v. Smith and Orr*, 1894, 2 I. R. 381; see also *Belfast and N. C. Ry. Co.*, 1895, 1 I. R. 297). Registered lands in the hands of a transferee for valuable consideration are only affected by (1) burdens registered under the Act, (2) burdens which are without registration to affect registered land. The burdens which may be registered are enumerated in sec. 45. Those which, without registration, affect the land are specified in sec. 47. Charges on registered land can be created and transferred only in the manner prescribed. Till the transferee is registered no estate passes. Crown debts and *lis pendens* must be registered and

re-registered every five years. No title by adverse possession can be acquired without order of the Court. All devolutions by operation of law must appear on the register. Where freehold lands have been compulsorily registered under the Land Purchase Acts, the legal estate, on the death of the registered owner, devolves upon his personal representative like a chattel real, notwithstanding any testamentary disposition. The beneficial interest on intestacy devolves as personal estate, and such lands are not liable to dower or curtesy. An heir or devisee may, with the assent of the personal representatives, be registered as owner, subject to any charges due from the personal representatives. An insurance fund is established to indemnify innocent purchasers against mistakes in registration.

[Madden's *Registration*; Kelly's *Registration*.]

*Stock*.—See STOCK. For guaranteed land stock, see *Land Purchase, supra*; for baronial guaranteed stock, see *Trainways and Light Railways Acts, supra*, and 43 & 44 Vict. c. 44.

**Iron Mines.**—See MINES AND MINERALS.

**Irregularity.**—See *Ex parte Johnson*, 1883, 53 L. J. Ch. 309.

**Irrelevancy.**—See EVIDENCE.

**Irremoveability.**—See POOR LAW.

**Is.**—Sec. 6 of the Representation of the People Act, 1867, provides that a person who "is of full age and not subject to any legal incapacity," and is otherwise duly qualified as therein stated shall be entitled to be registered as a parliamentary voter. This requires that the person shall have been of full age on or before the last day of the qualifying year; it is not sufficient that the age qualification exists at the time of registration (*Hargreaves v. Hopper*, 1875, 1 C. P. D. 195).

**Isle.**—"By the name of an isle, *insula*, many manors, lands, and tenements may passe" (*Co. Litt.* 5 a).

**Isle of Man.**—See MAN, ISLE OF.

**Issuable Plea.**—An issuable plea was a plea going to the merits of the cause, upon which the plaintiff might take issue and go to trial (Tidd, *Practice*, 8th ed., p. 477).

**Issuable Terms.**—Hilary and Trinity were called issuable terms because issues were then joined in the causes to be tried at the ensuing assizes (Tidd, *Practice*, 8th ed., 102). All the four terms were, however, issuable terms for causes to be tried in London and Middlesex.

The division of the legal year into terms (*q.v.*) was abolished by sec. 26 of the Judicature Act, 1873.

**Issue.**—This word “has a popular meaning, being often used in the sense of ‘children,’ and a legal or technical meaning, being used in the sense of ‘descendants.’ . . . It is a term of flexible meaning” (per Jessel, M. R., in *Morgan v. Thomas*, 1882, 9 Q. B. D. 643, 645); and it may be used in the same instrument in both senses (*In re Warren*, 1884, 26 Ch. D. 208, and cases there cited).

When used as to real estate in a will, “issue” is *prima facie* a word of limitation; thus a gift to “A. and his issue” gives A. an estate tail, just as if it had been to “A. and the heirs of his body.” But it may appear from the context that the term is not used in this sense, but as a word of purchase (per Lord Cranworth in *Roddy v. Fitzgerald*, 1858, 6 H. L. at p. 872). In *Morgan v. Thomas*, *supra*, it was held to have been used in the latter sense. There the testator devised land to his eldest son L. “for life, and after his decease to his lawful issue and their heirs for ever, if any, and if he should die without leaving any children born in wedlock,” then to the testator’s son E. and his heirs; and it was decided that L. took only a life estate, the word “issue” being read as “children.”

“The rule that ‘issue’ is *prima facie* a word of limitation does not extend to bequests of personal estate (*Knight v. Ellis*, 1789, 2 Bro. C. C. 570; *Ex parte Wynch*, 1854, 5 De G., M. & G. 188). If it be clear that the testator intended to make such a disposition of personal estate as would, in the case of real estate, amount to an estate tail, the first taker will take the absolute interest; but it is not the case that every expression which would create an estate tail in real estate will be held to indicate the same intention in the case of personal estate. . . . Thus if personal estate or chattels real be given to A. for life, and after his decease to his issue, A. takes for life only and the issue take in remainder, although there be a gift over on failure of issue of A. (*Knight v. Ellis*, *supra*; *Ex parte Wynch*, *supra*; *Goldney v. Crabb*, 1854, 19 Beav. 338)” (Hawkins, *Construction of Wills*, 197).

When “issue” is used as a word of purchase it “has always been considered as synonymous to, and the same as, ‘descendants’; and whoever can make himself out a descendant of the person to whose issue the bequest is made has a right to be considered as *persona designata* in that bequest” (per Sir R. P. Arden, M. R., in *Davenport v. Hanbury*, 1796, 3 Ves. 257, 259; 3 R. R. 91). But where the “issue” is to take only the “parent’s” share, the word “issue” is *prima facie* restricted to children. “It is, I think, settled, but rather by the case of *Pruen v. Osborne*, 1840, 11 Sim. 132, than by *Sibley v. Perry*, 1802, 7 Ves. 522; 6 R. R. 183, that as a general rule when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent’s share, the word ‘issue’ is cut down to mean ‘children’” (per James, L.J., in *Ralph v. Carrick*, 1879, 11 Ch. D. at p. 882); and the rule thus stated as regards the collocation of “issue” and “parent” in a will applies equally to the like collocation in a deed (*Barraclough v. Shillito*, 1884, 53 L. J. Ch. 841). But where there is a gift over, even in the collocation of “parent” and “issue,” the word “issue” may have to be read not in its restricted meaning of “children,” but as synonymous with “descendants” (*Ross v. Ross*, 1855, 20 Beav. 645; *Ralph v. Carrick*, *supra*).

Under a legacy to the issue of A. all descendants are entitled and take

*per capita* as joint tenants (*Davenport v. Hanbury, supra*; *Hobgen v. Neale*, 1870, 40 L. J. Ch. 36).

[*Authority*.—Jarman, *Wills*, 5th ed., pp. 946–952, 1257–1284.]

**Issued.**—In *Green v. Wood*, 1845, 7 Q. B. 178, the Court refused to read the words “execution issued,” occurring in 3 Geo. IV. c. 39, s. 2, as meaning “execution levied.”

**Issue Living.**—The rule of construction by which a child *en ventre sa mère* is in law considered as a child *in esse*, is not confined to cases in which the unborn child is benefited by its application. Therefore where a woman, who was to have a certain share of an estate in case she had “issue living” at the death of the testator’s wife, gave birth to a child on the day following the date of the testator’s widow’s death, it was held that the gift took effect (*In re Burrows, Cleghorn v. Burrows*, [1895] 2 Ch. 497).

**Issue of Bank Notes.**—The word “issue” in sec. 11 of the Bank Charter Act, 1844, “means the delivery of notes to persons who are willing to receive them in exchange for value in gold, in bills, or otherwise; the person who delivers them being prepared to take them up when they are presented for payment” (*A.-G. v. Birkbeck*, 1884, 12 Q. B. D. 605, 611).

**Issue of Bills of Exchange or Promissory Notes.**—The term “issue” is defined in the Interpretation clause of the Bills of Exchange Act, 1882 (s. 2), as meaning “the first delivery of a bill or note, complete in form, to a person who takes it as a holder.”

**Issue of Débentures.**—Debentures are “issued,” within sec. 17 of the Bills of Sale Act, 1882, when they are delivered over by a company to the person having the charge (*Levy v. Abercorris Slate Co.*, 1887, 37 Ch. D. 260, 264).

**Issue of Orders.**—By sec. 161 of the Metropolis Management Act, 1855, overseers to whom any order made by a vestry or district board under sec. 158 is “issued,” are required to levy the amounts mentioned therein. The meaning of the term “issue” in this connection was discussed in *Glen v. Overseers of Fulham*, 1884, 14 Q. B. D. 328. In his judgment in that case Stephen, J., said, p. 334: “As I read it, the *issuing* of an order means, and is exactly the same as, *making* an order under their seal. The issuing is not sending the order by the clerk to the overseers, but it is issuing it out of their own minds by their own hands, and putting the seal on a piece of paper. Serving the order is one thing, and issuing the order is another.”

**Issue of Shares.**—Shares may be “issued” within the meaning of sec. 25 of the Companies Act, 1867, although the certificate in respect of

them has not been issued (*In re Heaton's Steel and Iron Co.*, *Blyth's case*, 1876, 4 Ch. D. 140). "The Act of Parliament imposes no condition upon allotment such as it imposes on the issue of shares, and I think that inasmuch as the term 'issue' is used it must be taken as meaning something distinct from allotment and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete" (per Cockburn, C.J., in *In re Ambrose Lake Tin and Copper Co.*, *Clarke's case*, 1878, 8 Ch. D. 635, 638). But to determine whether or not there has been an "issue" of shares the Court must look at all the circumstances of the case (per Thesiger, L.J., *ibid.* p. 642; *In re Tunnel Mining Co.*, *Pool's case*, 1887, 35 Ch D. 579). Shares for which a person subscribes the memorandum of association of a company are "issued" to him at the moment of the registration of the company (*Dalton Tine Lock Co. v. Dalton*, 1892, 66 L. T. 704). See Buckley, *Companies Acts*, 7th ed., 612.

**Issue Roll**—A roll upon which issues had to be entered according to the old practice; separate rolls were kept for each term (Tidd, *Practice*, 8th ed., 791-793).

**Issues.**—When, in the course of pleading, the plaintiff and the defendant come to a certain and material point which is affirmed by the one and denied by the other, they are said to be at issue, the term being taken from the Latin *exitus* (3 Blackstone, 313).

Issues are of two kinds, namely, upon matter of fact and upon matter of law (*ibid.* 314). An issue of fact arises when the party pleading denies the truth of some material averment of fact in his opponent's pleading. Issues of fact were formerly either general or special. The term *general issue* was used to describe a plea which traversed the whole declaration or the principal facts on which it was founded. Thus the plea "Not guilty" in actions of tort, and of "*Non assumpsit*" in actions of contract, were called general issues (see Stephen on *Pleading*, 7th ed., p. 152; and GENERAL ISSUE). The same term was also applied to the issue produced by such pleas. The term *special issue* was similarly employed with regard to the issues arising out of pleas of a more specific nature than those above alluded to, and which were known as special pleas, and later on it was also applied to the pleas producing such issues (Stephen on *Pleading*, 7th ed., p. 171).

An issue of law arises where the plaintiff or the defendant, assuming, for the purposes of the issue, that the facts stated in the opposite pleading are true, denies that they are sufficient in their legal effect to support the claim or defence set up by the other side. These issues of law were formerly called "demurrers" (see DEMURRER), but they were abolished as such by Order 25 of the R. S. C. 1883, and certain other proceedings were substituted in place thereof (see PROCEEDINGS IN LIEU OF DEMURRER).

At common law issues of fact and issues of law could not be pleaded to the same pleading, but this rule was modified by sec. 80 of the Common Law Procedure Act, 1852, which enacted that either party might by leave of the Court plead and demur to the same pleading; and now objections in point of law may, without leave, be pleaded together with traverses of fact (see Bullen and Leake, 5th ed., p. 599).

**It shall be lawful.**—See MAY.

• **It shall suffice.**—These words, occurring in the rubric to the Communion Office as to the bread to be used, were discussed in *Kidsnalc v. Clifton*, 1877, 2 Prob. 276. At p. 346, Lord Cairns, L.C., who delivered the judgment of the Court, said: "There is no doubt that in many cases these words standing alone, and unexplained by a context, would be quite consistent with something different from, larger or smaller, more or less numerous, more or less costly, than what is mentioned, being supplied. Here, however, the sentence commences with the introduction: 'To take away all occasion of dissension and superstition, which any person hath or might have concerning the bread, it shall suffice,' etc. These words seem to their Lordships to make it necessary that that which is to take away the occasion of dissension and superstition should be something definite, exact, and different from what had caused the dissension and superstition. If not, the occasion of dissension remains, and the superstition may recur. 'To suffice,' it must be as here described. What is substantially different will not 'suffice.'" It was held in that case that these words did not sanction the use of a wafer. See RITUAL.

**Jactitation of Marriage.**—Where it is desired to obtain a judicial decision that a lawful marriage does not subsist between two living persons, one mode of procedure adopted in England is by suit for jactitation of marriage. Until 1857 this proceeding could take place only in the Ecclesiastical Courts. It is now transferred to the Probate, Divorce, and Admiralty Division of the High Court (1857, c. 85, s. 6), without any change in its nature or incidents. The suit must be brought by a party to the marriage (*Campbell v. Corlacy*, 1862, 31 L. J. Prob. 60).

In the suit the petitioner alleges that the respondent boasts that he or she is married to the petitioner, and prays a declaration of nullity and a decree putting the respondent to silence thereafter (*Duchess of Kingston's case*, 1776, 20 St. Tri. 355; *Hawke v. Corri*, 1820, 2 Hag. Con. 280, 285).

The possible defences are—

- (1) Denial of the boasting;
- (2) Allegation of an actual marriage;
- (3) An allegation (by way of estoppel) of acquiescence by the petitioner in the boasting (*Hawke v. Corri*, 1820, 2 Hag. Con. 280; *Bodkin v. Case*, 1835, Milw. Ir. Eccl. Rep. 356). If there is any evidence of acquiescence at any time no decree will be granted (*Thompson v. Rourke*, [1893] Prob. 70). Where no defence is put in, a trial by jury will not as a rule be ordered (*Thompson v. Rourke*, [1892] Prob. 244). No order for alimony or custody of children can be made in this suit.

The action is now rare, as the same result and a more conclusive judgment can be obtained in a nullity suit.

[*Authorities.*—Browne and Powles on *Divorce*, 6th. ed., 165; Geary on *Marriage*, 378.]

**Jamalca.**—The largest of the British islands in the West Indies, was discovered by Columbus, and remained in Spanish hands for 161 years.



In 1655 it was captured by a force sent out by Cromwell, and in 1670 it was ceded by Spain to England. In 1661 the governor was empowered to establish Courts, and to pass laws with the advice of an elected council. The common and statute law of England was made the basis of the laws of the colony. Difficulties occurred from time to time in working the constitution. In 1839 a bill to suspend the local legislature was introduced in the British House of Commons, but this measure did not become law. In October 1865 an insurrection broke out among the negroes, and the governor, Mr. Eyre, proclaimed martial law in the county of Surrey (except the city of Kingston). Courts-martial were thereupon set up, and many of the rebels were put to death. A commission of inquiry reported (9th April 1866) that the steps taken by the governor were necessary, but the commissioners thought that martial law was kept in force too long, and that the punishments inflicted were too severe. On the 6th February 1867, after hearing the argument of Mr. J. F. Stephen, the magistrate at Bow Street committed Colonel Nelson and Lieutenant Brand, two of the officers concerned in suppressing the insurrection, on a charge of murder. On the 10th April, Cockburn, C.J., charged the grand jury in the case, and discussed at great length the meaning of the term "martial law"; the grand jury ignored the bill. The Attorney-General having declined to prosecute Governor Eyre, an application was made by private prosecutors for a warrant under 11 & 12 Vict. c. 42; the magistrate refused to proceed, but a mandamus was granted by the Court of Queen's Bench (L. R. 3 Q. B. 478). On the 2nd June 1868, Blackburn, J., charged the grand jury, and the bill was ignored; on the 8th June Cockburn, C.J., took occasion to state in Court that Blackburn, J., must not be deemed to have spoken with the authority of his brother judges, and Blackburn, J., made a short statement in reply. One Phillips brought an action against the governor for assault and false imprisonment; the governor pleaded an Act of Indemnity passed by the local legislature, and this plea was held good (*Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225; in the Exchequer Chamber, 1871, L. R. 6 Q. B. 1).

In consequence of these troubles, Acts were passed in 1866 by the Legislature of the island and by the Imperial Parliament, empowering Her Majesty to constitute a new Government. By Orders in Council a nominated Legislative Council was established. The Orders now in force are those of the 19th May 1884 and 3rd October 1895, which provide that the Legislative Council is to consist of the governor, five *ex officio* members, not more than ten nominated members, and fourteen elected members. There is also a Privy Council, with the usual powers of an executive council. The Supreme Court is composed of the chief justice and two puisne judges; there is an appeal to the Queen in Council; for conditions of appeal, see PRIVY COUNCIL. Appeals may be brought from British Honduras (*q.v.*) to the Supreme Court of Jamaica.

[*Authorities.*—Bryan Edwards, *History of the British West Indies*; Clark, *Colonial Law*; Jamaica Statutes; Colonial Office List. The charge of Cockburn, C.J., in *R. v. Nelson and Brand* was published in pamphlet form.]

**Japan.**—A chain of islands off the eastern coast of Asia which from an early period have formed one empire. The Mikado or Emperor was always regarded as the head of the State, but his powers were usurped by the hereditary chief of the army, called by Englishmen the Tycoon. By treaty with the Tycoon, Her Majesty acquired jurisdiction over British

subjects in Japan, and the Order in Council of 9th March 1865 established a Supreme Court for China and Japan. In 1868 the Tycoon was overthrown, and the authority of the Mikado restored. Her Majesty's treaty rights were confirmed by the new Government; the Order in Council of 14th August 1878 made further provision in regard to the Supreme Court, and established Her Majesty's Court for Japan. Since 1868 the progress of Japan has been remarkably rapid. A new constitution, framed on European models, has been adopted, and the laws of the country have been re-cast. For some time past the Japanese Government has been negotiating with a view to the abolition of the jurisdictions now exercised by foreign Powers in the dominions of the Mikado. By a treaty signed at London, July 16th, 1894, the British Government acceded to this proposal; but the "most favoured nation" clause of the treaty entitles us to maintain our Consular Courts, unless other Powers agree to give up the privileges which they now enjoy. If the necessary consents are obtained, the British Courts in Japan will cease to exist in July 1899.

The Japanese are a monogamous people, and a marriage between an Irish gentleman and a Japanese lady was recognised by Sir J. Hannen, 1890, 15 P. D. 76.

[*Authorities.*—The treaties and Orders in Council cited above will be found in Hertslet's collection.]

**Jeofails.**—It was the general rule at common law that writs and proceedings of or in Courts could not be amended even for false Latin or clerical errors, except apparently in the case of judgments or parts of the record or acts of the Court, which could be amended in the same term, whether in civil or criminal cases. A series of statutes were passed at divers times to enlarge the power of amendment. They were—14 Edw. III. c. 6; 9 Hen. v. c. 4; 4 Hen. VI. c. 3; 8 Hen. VI. cc. 12, 15; 32 Hen. VIII. c. 30; 37 Hen. VIII. c. 6; 18 Eliz. c. 14; 21 Jac. I. c. 13. They were known as the Statutes of Jeofails (*j'ai failli*). The old law as to amendment in civil proceedings (which is collected in Viner, *Abr. tit. "Amendment and Jeofails"*) is wholly superseded as to the High Court by the Judicature Acts and Rules, and survives only, if at all, in a few local Courts of record. The Acts above mentioned were repealed as to civil proceedings in 1883 (c. 46). The statutes survive in theory as to criminal proceedings; but see INDICTMENT.

**Jersey.**—See CHANNEL ISLANDS.

**Jervis' Acts** is the popular title for those Acts of 1848 passed at the instance of Mr. John Jervis, a Chief Justice of the Common Pleas, which are now officially cited as the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42; Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 43 (see SUMMARY JURISDICTION); Justices Protection Act, 1848, 11 & 12 Vict. c. 44 (see JUSTICE OF THE PEACE).

**Jésuit.**—The Jesuits are a community in the Roman Catholic Church, of which the first superior was Ignatius Loyola, who was chosen in 1541. They played a peculiarly active part in the movement of the counter-Reformation, and for this reason were objects of grave suspicion

to the English Government from the sixteenth to the eighteenth centuries, being specially mentioned in most of the Acts dealing with popish recusants (as to which, see Gibson, *Col.* vi. pp. 526, 529, 538, 591, 595).

The Roman Catholic Emancipation Act, 1829 (10 Geo. iv. c. 7), s. 28, specially mentions the "Jesuits and members of other religious orders and societies" who are resident within the United Kingdom, and recites, "that it is expedient to make provision for the gradual suppression and final prohibition of the same therein."

Sec. 29 provides that a Jesuit coming into the realm may be convicted for a misdemeanour and ordered to be banished for life.

Sec. 30 allows natural-born subjects who are Jesuits to be registered; and sec. 31 allows the Chief Secretary of State, not being a Roman Catholic, to grant licences to Jesuits to come into the kingdom for a period of six months or under. By sec. 32 such licences are to be laid before Parliament.

By sec. 34 any person admitted to be a Jesuit or member of a religious order after the commencement of the Act is liable to be convicted for a misdemeanour and banished for life.

And by sec. 38 a person within three months of such sentence found at large in the United Kingdom may be transported for life.

No practical effect, it is hardly necessary to state, has ever been given or is likely to be given to these provisions. (See further, articles ROMAN CATHOLIC; RELIGIOUS ORDER.)

**Jetsam.**—See FLOTSAM, JETSAM, AND LAGAN.

**Jettison.**—See AVERAGE.

**Jewels.**—On the construction of the will before the Court in *A.-G. v. Harley*, 1828, 5 Russ. 173, a diamond necklace and cross and diamond rings were held to be included in the term "jewels." In *Sudbury v. Brown*, 1856, 4 W. R. 736, a bag of coins was held not to pass under a bequest of "jewellery." Masonic orders and silver filagree ornaments were held to pass as "jewels" in *Brooke v. Warwick*, 1848, 2 De G. & Sm. 425.

Old family jewels, which a husband permits his wife to wear occasionally, do not become paraphernalia (see HUSBAND AND WIFE) (*Jervoise v. Jervoise*, 1853, 23 L. J. Ch. 703), but other jewels given by a husband to his wife to be worn as ornaments are paraphernalia (*ibid.*).

**Jews.**—The political and civil disabilities formerly attending the profession of the Jewish religion have been almost entirely removed. Jews were formerly practically, though not directly, excluded from Parliament by the form of the oath (*Miller v. Salomons*, 1852, 8 Ex. Rep. 788), but in 1868 the forms of the parliamentary and other legal oaths when to be taken by them were modified (21 & 22 Vict. c. 49) by omitting the usual reference to the faith of a Christian. It was provided that the Act should not extend to enable a Jew to become Regent, Lord Chancellor, or Lord Lieutenant of Ireland.

Their schools, places for worship and for education, and other charitable

purposes, and the property held therewith, have been placed on the same footing as those of Protestant NONCONFORMISTS (*q.v.*; 9 & 10 Vict. c. 59, s. 2; 18 & 19 Vict. c. 86, s. 2). The right of presentation attaching to any office held by a Jew is to be exercised by the Archbishop of Canterbury, and no Jew is to advise the Crown in regard to any office or preferment in the Church of England (21 & 22 Vict. c. 49).

The Factory Acts recognise that for Jews Saturday corresponds to the Christian Sunday. By the Act of 1878 (41 & 42 Vict. c. 16, ss. 50 & 51) it is provided that, where the occupier of a factory or workshop is a Jew, he may either employ young persons and women between sunset and 9 p.m. on Saturday, or else employ them one hour extra on each of the other five week days. If all the children, young persons, and women employed are Jews, he may give two other holidays instead of Christmas Day and Good Friday (s. 50). It is further provided (s. 51) that he may employ young persons and women who are Jews in the factory or workshop on Sunday, but only if it has been closed on Saturday, and he has not made use of either alternative under sec. 50. Neither section enables the factory or workshop, on Sunday, Christmas Day, or Good Friday, to be open for traffic, that is for effecting sales or receipt of fresh orders (*Goldstein v. Vaughan*, [1897] 1 Q. B. 549).

Ministers of Jewish congregations are exempted from serving on juries (Juries Act, 1870).

The marriage of Jews, where both parties are Jews, may be solemnised according to the ceremonial of their own religion. The restrictions of the earlier Marriage Acts (26 Geo. II. c. 32; 4 Geo. IV. c. 76, s. 31) did not extend to such marriages. The Marriage Act, 1836 (6 & 7 Will. IV. c. 85, ss. 2, 4, 16), requires that notice shall be given of the intended marriage to the superintendent registrar of the district in which the parties reside, or the registrar of each district, where they do not reside in the same, and his certificate be issued. It is the duty of the Secretary of the Synagogue to which the husband belongs to forthwith register the marriage in the duplicate register kept by him (Registration Act, 1836, 6 & 7 Will. IV. c. 86, ss. 30 and 31; 19 & 20 Vict. c. 119, s. 22). The Registrar of Marriages need not be present at the ceremony (Hammick's *Marriage Law of England*, 2nd ed., pp. 159-165). Jews may also be married by licence (Marriage Act, 1856, 19 & 20 Vict. c. 119, s. 21). The prohibited degrees laid down by Lord Lyndhurst's Act (5 & 6 Will. IV. c. 54) differ in some particulars from those of the Jewish religion. It seems that they apply nevertheless to Jewish marriages contracted in England (Hammick, p. 164). Jewish religious law admits of extra-judicial divorces, but in this particular also the ordinary English law applies to Jews (*ibid.* p. 165). The ordinary presumption of marriage from cohabitation applies in the case of a Jew and a Christian, although their marriage would not be recognised by the Jewish religion (*Goodman v. Goodman*, 1859, 33 L. T. 70).

**Jobber.**—See STOCK EXCHANGE.

**Joinder of Causes of Action.**—A plaintiff was always permitted at common law to join in one declaration several different claims, provided they were all between the same parties, suing or sued in the same right, and were also of the same quality or character, *e.g.* claims on two

different bonds, or two separate covenants (*Shepherd v. Shepherd*, 1845, 1 C. B. at p. 856); and a claim for a debt due on a bond might, it seems, have been joined at common law with a claim for a debt due on a simple contract (Stephen on *Pleading*, 325). But a count in trespass could not be joined with a count in trover; still less a count in contract with a count in tort. By sec. 41 of the Common Law Procedure Act, 1852, however, it was enacted that "causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit," except in actions of replevin and ejectment, subject to the power of a judge to order them to be tried separately if he deemed it expedient. But this section did not enable a plaintiff who was an executor to join claims in his own right with claims by him as executor. By the preceding section of the same Act (s. 40) a husband was permitted to join claims in his own right with claims brought by himself and his wife as co-plaintiffs for an injury done to her. The Judicature Act, 1873, went a great deal further. It appeared, indeed, to one who did not read its provisions by the light of the previous practice, to give a plaintiff an almost unlimited power of joining as many different causes of action as he thought fit against any number of defendants, from whom he claimed any relief, "whether jointly, severally, or in the alternative" (Order 16, r. 1). But it has now been decided that this is not the law. The power of joining causes of action under the present system, though very extensive, is still subject to considerable (and very sensible) restrictions. It is obviously a mistake for a plaintiff to confuse the jury and damage his chances of success by mixing together incongruous claims. On the other hand, whenever several causes of action can be conveniently tried together, it is the duty of a plaintiff to avail himself of the powers given him and join them all in one writ, if he may; otherwise, he may be mulcted in costs (see *Heimbs v. Newcastle Co-operative Society*, 1897, 76 L. T. 109).

Cases in which every plaintiff and every defendant is interested in every cause of action which it is proposed to join obviously stand in a very different position from those in which one or more of the parties is not concerned in one or more of the causes of action included in the Statement of Claim. Let us therefore deal with each class of cases separately.

#### I. WHERE ALL THE CAUSES OF ACTION ARE BETWEEN THE SAME PARTIES.

The plaintiff may now join on his writ or Statement of Claim any number of such causes of action, whether they sound in contract or in tort, and whether they arise out of the same transaction or not. But the defendant is not left unprotected. If he can persuade a Master that the plaintiff has united in the same action several causes of action which cannot be conveniently tried or disposed of together, the Master may always order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just (Order 18, rr. 1, 7, 8, 9). Thus a claim for damages for libel, and a claim to have new trustees of a trust fund appointed, cannot be conveniently tried together in the same action (*South African Republic v. Chemin de Fer du Nord*, [1897] 2 Ch. 487).

To this general rule there are three exceptions—

(a) Claims by a trustee in bankruptcy, as such, cannot, except by leave of a Master, be joined with any claim by him in any other capacity (Order 18, r. 3).

(b) Claims by or against an executor or administrator, as such, may not

be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant is executor or administrator (Order 18, r. 5; *Whitworth v. Darbishire and Others*, 1893, 41 W. R. 317; 68 L. T. 216).

(c) No cause of action may, unless by leave, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent, or double value in respect of the premises claimed or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed (Order 18, r. 2). But no leave is required to join a claim for an *interim* injunction (*Read v. Wotton*, [1893] 2 Ch. 171). An action to establish title to land is not an action for the recovery of land within this rule (*Gledhill v. Hunter*, 1880, 14 Ch. D. 492). And if such claims be joined without leave, still this irregularity is waived, if the defendant, without raising the objection, takes a step in the action which would be neither necessary nor useful if he intended to rely on that objection (per Cave, J., in *Rein v. Stein*, 1892, 66 L. T. at p. 471). He is supposed to know the law, and thus has notice of the irregularity as soon as he sees the writ or pleading (*Mulckern v. Doercks*, 1884, 53 L. J. Q. B. 526; but see *Hunt v. Worsfold*, [1896] 2 Ch. 224). As to what is a "step in the action," see *Ives & Barker v. Willans*, [1894] 2 Ch. 478.

Subject to these exceptions, the plaintiff may unite in the same action any number of causes of action in which all parties are concerned, and which can be conveniently tried together.

## II. WHERE ONE OR MORE OF THE PLAINTIFFS HAS NO INTEREST IN SOME OF THE CAUSES OF ACTION JOINED.

Here at once more difficulty arises. Two cases, however, are quite clear; for they are expressly dealt with by rules of Court:—(a) "Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant" (Order 18, r. 6); and (b) "Claims by or against husband and wife may be joined with claims by or against either of them separately" (Order 18, r. 4).

But in both these cases it will be observed that all the plaintiffs are properly joined in the action, as they are necessary parties to the joint claims; and being thus already parties, it clearly saves time and trouble for them to join their separate claims against the same defendant. But suppose there is no joint claim: if two unconnected persons have each a distinct and separate cause of action against the same person, may they join in one writ? This question has been much debated lately (*Hannay v. Smurthwaite*, [1893] 2 Q. B. 412; *Smurthwaite v. Hannay*, [1894] App. Cas. 494; and *Carter v. Rigby & Co.*, [1896] 2 Q. B. 113). But the language of Order 16, r. 1, was amended in 1896, and it is now settled that "all persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise." If, upon the application of any defendant, it appears that such a joinder of causes of action will embarrass or delay the trial of the action, the Court or a judge may order separate trials, or make such other order as may be expedient. If no such order be made and the action proceeds, judgment may be given, for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amend-

ment. But the defendant, though unsuccessful, will be entitled to any costs which are occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge shall otherwise direct. This rule, even as amended, applies only to separate causes of action against the same defendant, or in which all the defendants are interested.

Hence it would seem now to be the law that any number of persons who have separate interests in the same premises may join as co-plaintiffs in the same action in respect of any injury done to those premises. *E.g.* the owner and the tenant of a house may sue together for an injunction to restrain a nuisance to that house. Or the owners and tenants of two or more adjoining houses may all join in one action to restrain, or to recover damages for, any nuisance or other injury which affects their respective properties, though to different extents, provided such nuisance or injury is caused by the same acts of the same person (*House Property Co. v. Horse Nail Co.*, 1885, 29 Ch. D. 190). It is true that in the case of *Heimbs v. Newcastle Co-operative Society*, 1897, 76 L. T. 109, a different opinion was apparently expressed; but the attention of the learned judge was not called to the alteration then very recently made in the language of Order 16, r. 1.

Again, if a committee or any other defined body of persons be libelled or slandered collectively as a body, they may all join in one action (*Booth and Others v. Briscoe*, 1877, 2 Q. B. D. 496). But if A. defames B. on one occasion, and C. on another, B. and C. cannot join as co-plaintiffs in one action against A., even though the charges be "historically" connected; for each slander is a separate "transaction" (*Sandes and Another v. Wildsmith and Another*, [1893] 1 Q. B. 771).

### III. WHERE ONE OR MORE OF THE DEFENDANTS HAS NO INTEREST IN SOME OF THE CAUSES OF ACTION JOINED.

The power of joining several defendants in one action has always been wider than the power of joining several plaintiffs. But the extent of such liberty is not clearly defined. The rules at present in force are very wide and general in their terms.

It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest (Order 16, r. 5).

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment (Order 16, r. 4).

Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may . . . join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties (Order 16, r. 7).

Hence where two defendants are sued on a joint cause of action (*e.g.* conspiracy), claims against each defendant severally (*e.g.* for the various wrongful acts done in pursuance of that conspiracy) may be joined in the same action (*Desilla v. Schunck & Co. and Fels & Co.*, 1880, W. N. 96). And a plaintiff may still apparently join in one action a claim against a principal on a contract made by his alleged agent, and an alternative claim against the alleged agent for contracting without authority (*Honduras Ry. Co. v. Lefevre & Tucker*, 1877, 2 Ex. D. 301; *Massey v. Heynes*, 1888, 21 Q. B. D. 330; *Bennetts v. McIlwraith*, [1896] 2 Q. B. 464). But in all these cases

the plaintiff will, of course, have to pay the costs of any defendant unnecessarily or improperly joined.

It will, moreover, be seen that there is nothing in the above rules to prevent a plaintiff from joining on one writ two distinct and separate causes of action against different defendants, which do *not* arise out of the same transaction, so long as they can be conveniently tried together. Indeed, the rules as they stand distinctly encourage him to do so. But this is not the practice; and probably no such result was intended by the framers of the rules. It was decided in the House of Lords in *Sadler v. Great Western Rwy. Co. and Midland Rwy. Co.*, [1896] App. Cas. 450, that claims for damages against two or more defendants in respect of their several liability for separate torts cannot be combined in one action. And the rules relating to the joinder of defendants have not been modified in any way since this decision, to make them correspond with the amendment made in the rule as to plaintiffs (Order 16, r. 1); so that the authority of *Sadler's case* remains unshaken (*Gower v. Couldridge and Others*, 1898, 14 T. L. R. 165).

Hence if the same libel appears in seventeen newspapers, the person libelled must bring seventeen actions, one against each newspaper, if he desires to recover damages from them all (though an action against one would sufficiently clear his character). He cannot make the seventeen proprietors defendants to one writ (*Colledge v. Pike*, 1886, 56 L. T. 124). But the seventeen actions can now be consolidated, before any Defence is delivered, on the application of either the plaintiff or the defendants under sec. 5 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64) (see *Martin v. Martin*, [1897] 1 Q. B. 429; *Stone v. Press Association Ltd.*, [1897] 2 Q. B. 159; and CONSOLIDATION OF ACTIONS, vol. iii. p. 280).

#### IV. WHERE NEITHER ALL THE PLAINTIFFS NOR ALL THE DEFENDANTS ARE CONCERNED IN ONE OR MORE OF THE CAUSES OF ACTION JOINED.

This last case presents no difficulty. Distinct and separate causes of action, with different plaintiffs and also different defendants, cannot be joined on the same writ. If A. has a cause of action against B., and X. has a wholly independent cause of action against Y., A. and X. cannot issue one writ against B. and Y., even though the separate actions arise out of similar transactions and involve similar questions of law or fact. The only thing that can be done, if there be many such actions, is for all parties to agree that one shall be taken as "a test action," and that the others shall be stayed till that one is tried, and then follow its event.

**Joinder of Issue.**—A joinder of issue is a compendious form of traverse which is permitted in a Reply or any subsequent pleading. Instead of dealing specifically with every allegation of fact in his opponent's pleading of which he does not admit the truth, the party pleading merely states that "he joins issue" with his opponent thereon. Such joinder of issue operates as a denial of every material allegation of fact in his opponent's pleading which he does not expressly admit (Order 19, r. 18). But a joinder of issue is a mere traverse; it denies, but it does not confess and avoid (see PLEADING, *under the Judicature Acts*). The plaintiff must expressly add all such grounds of reply as, if not raised, would be likely to take the defendant by surprise, or would raise issues of fact not arising out of the Defence, such as fraud, release, payment, performance, illegality, Statute of Frauds, Statute of Limitations, etc. (Order 19, r. 15). These matters may be pleaded with a joinder of issue; but each party in turn should be careful



not to join issue merely where he ought to allege new facts or to raise an objection in point of law (see *Clark v. Hougham*, 1823, 2 Barn. & Cress. 149; *Kempe v. Gibbon*, 1846, 9 Q. B. 609; *Hall v. Eve*, 1876, 4 Ch. D. 341, 347; *Williamson v. L. and N.-W. Ry. Co.*, 1879, 12 Ch. D. 787).

### **Joinder of Parties.**—See PARTIES.

**Joint Account Clause.**—Prior to the Conveyancing Act, 1881, when several persons, *e.g.* trustees, lent money on one mortgage, it was usual to state on the face of the deed that the loan was made out of money belonging to the mortgagees on a joint account “in equity as well as at law.” This was done because the Courts of equity held that where money was advanced by several persons it belonged to them severally, and the effect of this was that in the event of the death of one of the mortgagees the survivors could not give a valid receipt to the mortgagor on reconveying the estate to him; it was necessary that the representative of the deceased mortgagee should join in the receipt and reconveyance. Now by sec. 61 of the Conveyancing Act, 1881, it is provided that where money is expressed to be advanced by or owing to more persons than one out of money or as money belonging to the lenders on a joint account, the receipt of the survivors or last survivor, or of the personal representative of the last survivor, shall be a complete discharge for all money due, notwithstanding any notice to the payer of a severance of the joint account. But this section only applies to mortgages, obligations, or transfers of such securities made on or after 1st January 1882, and only to these if a contrary intention is not expressed in the particular instrument. Notwithstanding the fact that a mortgage was taken in the names of three persons as joint-tenants, and the insertion of a joint account clause, it was held in *In re Jackson, Smith v. Sibthorpe*, 1887, 34 Ch. D. 732, on the evidence in that case, that the mortgagees were entitled to the mortgage money as tenants in common.

### **Joint Action.**—See JOINDER OF CAUSES OF ACTION; PARTIES.

**Joint Administration.**—The Court may, but rarely does, exercise its power of granting letters of administration to more than one person. “The Court prefers *ceteris paribus* a sole to a joint administration, because it is infinitely better for the estate; administrators must join and be joined in every act, which would not only be inconvenient to themselves, but what is of more consequence must be inconvenient to those who have demands on the estate either as creditors or as entitled in distribution” (per Sir John Nicholl in *Warwick v. Greville*, 1809, 1 Phillim. Eccl. 126). It therefore requires strong circumstances to induce the Court to make a joint grant (*In the goods of Richards*, 1871, L. R. 2 P. & D. 216). Such a grant was made in *In the goods of Grundy*, 1868, L. R. 1 P. & D. 459, there being in that case special circumstances rendering a joint grant convenient.

**Joint and Several Liability.**—Persons may be liable not only jointly but also jointly and severally, and the latter form of liability

is more often found than the former, inasmuch as it is more beneficial to the creditor. Where the liability is joint and several the creditor may at his option sue one or more or all of the debtors in the same action, and a judgment recovered against one, if unsatisfied, is no bar to an action against the others (*King v. Hoare*, 1844, 13 Mee. & W. 494). Further, the estate of one of two or more debtors bound jointly and severally who has died is not discharged from liability to the creditor, as it would be if the liability were joint only.

The two kinds of liability are alike in this, that the discharge of one of the joint and several debtors discharges the others (*Clayton v. Kynaston*, 1699, 2 Salk. 574; *Nicholson v. Revill*, 1836, 4 Ad. & E. 675, 683), although a covenant not to sue one with a reservation of remedies against the others will not operate to discharge the latter (*Thompson v. Lack*, 1846, 3 C. B. 540; *Kearsley v. Cole*, 1846, 16 Mee. & W. 128, 136).

If one debtor pays the whole debt, he is entitled to contribution from those bound jointly and severally with him.

A debtor bound jointly and severally is entitled to the benefit of the Statute of Limitations notwithstanding any payment by the other debtors (Mercantile Law Amendment Act, 1856, s. 14). See JOINT LIABILITY.

**Joint Candidate (Parliamentary).**—See CANDIDATE.

**Joint Captors.**—See PRIZE.

**Joint Contractors.**—See JOINT LIABILITY; JOINT AND SEVERAL LIABILITY.

**Joint Liability.**—"By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint" (per Abbott, J., in *Richards v. Heather*, 1817, 1 Barn. & Ald. 35), and all must be sued together during their joint lives, for a judgment obtained against one, although unsatisfied, is a bar to an action against the others, either in respect of a joint debt (*King v. Hoare*, 1844, 13 Mee. & W. 494) or in respect of a joint tort (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547); and this is so although the plaintiff may not have known when he brought his action and obtained judgment that any one other than the original defendant could have been sued with him (*Kendall v. Hamilton*, 1879, 4 App. Cas. 504). But the technical rule that a judgment although unsatisfied obtained against one of two joint debtors or joint tortfeasors is a bar to an action against the other is confined to cases where the cause of action is the same; therefore, where a judgment was obtained against one of two joint guarantors upon a cheque given by him for the amount jointly due under the guarantee, it was held that this judgment, unsatisfied, was no bar to an action against the other joint guarantor upon the guarantee (*Wegg-Prosser v. Evans*, [1895] 1 Q. B. 108, following *Drake v. Mitchell*, 1803, 3 East, 251; 7 R. R. 449, and overruling *Cambefort v. Chapman*, 1887, 19 Q. B. D. 229). A release granted to one joint tortfeasor or joint debtor operates as a discharge of the other joint tortfeasors or debtors (*Duck v. Mayeu*, [1892] 2 Q. B. 511, 513), but a covenant not to sue one of several joint debtors does not release the others

(*Hutton v. Eyre*, 1815, 6 Taun. 289; 16 R. R. 619), nor does a covenant not to sue one of several joint tortfeasors (*Duck v. Mayeu, supra*). The fact that one of several joint debtors has become bankrupt and has obtained his discharge does not release the others who were jointly liable for the debt with him (Bankruptcy Act, 1883, s. 30, subs. 4).

After the death of one of two joint debtors the survivor is solely liable to the creditor (*Richardson v. Horton*, 1843, 6 Beav. 185), but in the case of a partnership, although the members of a firm are only jointly and not jointly and severally liable for the debts and obligations incurred by the partnership, the estate of a deceased partner is also severally liable in due course of administration in respect of debts, etc., incurred while he was a partner, subject to this, that partnership creditors must not compete with the separate creditors of the deceased partner, and that the surviving partner or partners must be before the Court (Partnership Act, 1890, s. 9; *In re Hodgson, Beckett v. Ramsdale*, 1885, 31 Ch. D. 177).

No joint contractor loses the benefit of the Statutes of Limitation by reason only of any written acknowledgment or promise made and signed by any of his joint contractors (9 Geo. IV. c. 14, s. 1), or by payment of any principal, interest, or other money by any of such joint contractors (Mercantile Law Amendment Act, 1856, s. 14); and by the last-mentioned statute it is further provided that the absence of one or more of several joint debtors beyond the seas will not deprive the others of the benefit of the Statutes of Limitation, but that recovery of judgment against these, without satisfaction, will not bar an action against the other or others on his or their return from beyond seas (s. 11).

If one of several joint debtors is sued alone for the joint debt he is *prima facie* entitled to have the other joint debtors, if they are resident within the jurisdiction, added as co-defendants, but the Court has a discretion in the matter (*Wilson v. Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 422, 427). In the case just mentioned the Court refused to add as a co-defendant a joint debtor who was a foreigner resident out of the jurisdiction.

One joint debtor who has been compelled to pay the whole of the joint debt is entitled to contribution from the others (*Dering v. Earl of Winchelsea*, 1787, 2 Bos. & Pul. 270; 2 White and Tudor, *L. C.*, 7th ed., 535; 1 R. R. 41). See JOINT AND SEVERAL LIABILITY.

**Joint Liquidators.**—When a company is to be wound up voluntarily, one or more liquidators may be appointed (Companies Act, 1862, ss. 133, 135); and when several are appointed, at least two must act in all matters, unless at the time of their appointment it has been determined otherwise (s. 133 (6)). It is usual, however, in a voluntary winding up, to have only one liquidator, although, if the winding up is continued under supervision, it is not uncommon for another liquidator to be appointed on behalf of the creditors; this can be done under sec. 150. In a compulsory winding up the Court may appoint one or more liquidators, and, where two or more are appointed, may give the conduct of any particular matter to one of them (*In re Midland Land and Investment Corporation*, W. N. 1887, p. 58). See COMPANY, Liquidator.

**Joint Lives.**—A gift to two persons “for their joint lives and after their decease” then over, was held to mean a gift to these persons as

joint-tenants (*Townley v. Bolton*, 1832, 1 Myl. & K. 148). The same construction was put upon the words in a settlement, "during their joint and natural lives," in *Smith v. Oakes*, 1844, 14 Sim. 122.

**Joint Mortgagees.**—Where there are several mortgagees who are joint-tenants or tenants in common of the money secured, they must all be parties to a foreclosure action, either as co-plaintiffs or, in the case of those unwilling to be joined as co-plaintiffs, as co-defendants (*Luke v. South Kensington Hotel Co.*, 1879, 11 Ch. D. 121). Payment of the mortgage money to one of two or more joint mortgagees is not, unless specially authorised by the others, sufficient to discharge the estate (*Matson v. Dennis*, 1864, 4 De G., J. & S. 345), unless under the authority of the Court (see *Bradford v. Nettleship*, 1862, 10 W. R. 264).

**Joint Owners.**—Joint owners of shares in a ship are considered for the purposes of registration to be only one person (Merchant Shipping Act, 1894, s. 4). They cannot dispose in severalty of any interest or share in a ship in respect of which they are registered (*ibid.*).

Where the articles of association of a company are silent as to the liability incurred by joint holders of a share, the liability is joint only (*Hill's case*, 1874, L. R. 20 Eq. 585). Table A in the first schedule to the Companies Act, 1862 (which, however, may be excluded or modified by the articles of association of a company), provides that if several persons are registered as joint holders of any share any of them may give effectual receipts for dividends (art. 1), and that the person whose name stands first in the register of members in respect of such a share is alone entitled to vote (art. 45).

For a general treatment of joint ownership, see JOINT-TENANCY.

**Joint Patentees.**—Patents for inventions may be granted to two or more persons jointly (Patents Act, 1883, s. 4 (2); Patents Act, 1885, s. 5). Either of two joint patentees may use the patent, he can sue alone in respect of an infringement, and may sell his interest, but he cannot do anything to prejudice the rights of the other joint patentee (Edmunds, *Patents*, 2nd ed., pp. 270, 279, 359). See PATENTS.

**Joint Possession.**—See JOINT-TENANCY.

**Joint-Stock Banks.**—See BANKS AND BANKER.

**Joint-Stock Company.**—An institution, *e.g.* a literary or scientific association, constituted by rules which do not permit of any dividend, division, or bonus among its members is not an "institution in the nature of a joint-stock company" within the proviso to sec. 30 of the Literary and Scientific Institutions Act, 1854.

For a full treatment of the subject of joint-stock companies, see title COMPANY.

## Joint-Tenancy.

### DEFINITION.

Joint-tenancy is ownership by two or more persons of real or personal property in equal undivided shares, the requisites of such ownership being unity of possession, interest, title, and time.

(1) *Unity of possession* (often described as possession *per my et per tout*, i.e. of the share and of the whole) refers to the non-divisibility during the joint-tenancy of the joint-tenants' shares, each joint-tenant being with respect to a stranger in the position of owner of the whole. Unity of possession is well illustrated by joint-tenancy in copyholds. The possession of joint-tenants being *per my et per tout*, the admittance of one joint-tenant is the admittance of all.

(2) *Unity of interest* refers to the identical nature of the estate of each joint-tenant, e.g. one cannot be tenant for life and another tenant in fee; the estate of each must be the same.

(3) *Unity of title* and (4) *unity of time* mean that the co-owners to be joint-tenants must acquire their interests by the same title, and that the interests must vest at the same time. But the common law doctrine of unity of time does not extend to interests under conveyances to uses or by devise.

A distinctive feature of joint-tenancy is the right of survivorship (*jus accrescendi*) whereby on the death of one joint-tenant his share accrues to the other or others.

### CREATION.

Joint-tenancy can arise by "purchase" only, never by descent, and may be for any estate except an estate tail general. A gift to A. and B. in tail, A. and B. being a man and woman capable of lawfully marrying, creates an estate in tail special. i.e. to A. and B. and the heirs of their two bodies; where A. and B. cannot at any time lawfully marry, A. and B. are joint-tenants for life; on the death of one, the survivor takes the whole, and on the death of the survivor the inheritance is divided in equal shares between the heir of the body of A. and the heir of the body of B., who then become tenants in common.

It will be convenient at this point to take notice of some results of the application of the principle of English law which looks upon a husband and wife as one person. (1) When property is given to A. and B., they being at the time of the gift husband and wife, they take as tenants by entireties. Their possession is not like that of joint-tenants proper possession *per my et per tout*, but each has possession of the entirety, possession *per tout et non per my*, and neither can alienate without the other's consent. (2) A gift to a man, his wife, and a third person is to be construed as a gift of one moiety to the husband and wife and of the other moiety to the third person. This rule is not affected by the Married Women's Property Act, 1882 (*In re March*, 1884, 27 Ch. D. 166; *Jupp v. Buckwell*, 1888, 39 Ch. D. 148). But the rule being one of construction, a very little indication of the intention to the contrary will exclude its application and lead to an opposite construction (*Dias v. de Liviera*, 1880, 5 App. Cas. 123; *Paine v. Wagner*, 1841, 12 Sim. 184; *In re Dixon*, 1889, 42 Ch. D. 306). See HUSBAND AND WIFE.

Although it is a general rule of common law that a grant to two or more persons and their heirs without further words creates a joint-tenancy, equity, while recognising this rule, has created three great exceptions by

acting according to the presumed intention of the parties to exclude the right of survivorship.

(1) Where money is advanced by several persons on mortgage, whether in equal or unequal shares, they are presumed to be tenants in common of the money (*Petty v. Styward*, 1 Eq. Cas. Ab. 290; 1 Ch. Rep. 57); and it may be added that the "joint account clause" frequently inserted to facilitate dealing with the property, is not conclusively binding on the persons interested in the money (*Harman v. Uxbridge and Rickmansworth Rwy. Co.*, 1883, 24 Ch. D. 720; *In re Jackson*, 1887, 34 Ch. D. 732). But, of course, a clear expression of intention to hold as joint-tenants will rebut the presumption of tenancy in common.

(2) Where several persons purchase lands and advance the money in unequal amounts, and this appears in the purchase deed, equity presumes a tenancy in common. And even if the money is advanced in equal shares other circumstances may be held sufficient evidence of an intention to hold as tenants in common (*Lake v. Craddock*, 1732, 3 P. Wms. 158; *White and Tudor, Leading Cases*, 7th ed., ii. 952; *Robinson v. Preston*, 1838, 2 Kay & J. 505).

(3) *Jus accrescendi inter mercatores pro beneficio commercii locum non habet*. In all cases of joint undertakings or partnerships persons taking a joint purchase are deemed tenants in common (*Lake v. Craddock*, *supra*; see also Partnership Act, 1890, s. 20 (3)).

#### SEVERANCE AND DETERMINATION.

Joint-tenancy may be determined by (1) alienation, (2) an increase of the interest of any one of the joint-tenants, (3) partition.

(1) Alienation to be valid and effectual must be *inter vivos*, for it is clear that alienation by will would be a violation and infringement of the right of survivorship which on the death of the testator would vest in the surviving tenants. *Jus accrescendi ultimæ voluntati præfertur*. The proper method of alienation by one co-tenant to another is by release.

Not only does alienation itself sever the joint-tenancy, but a contract to alienate will at once convert the joint-tenancy into a tenancy in common (*In re Wilford*, 1879, 11 Ch. D. 267). And a marriage settlement containing a proviso for the settlement of the present and after-acquired property of the intended wife (she being an infant entitled in remainder jointly with two others to certain annuities standing in the names of trustees), has been held to sever the joint-tenancy (*Burnaby v. Equitable Reversionary Interest Society*, 1885, 28 Ch. D. 416), and a covenant by the husband and wife to settle the wife's after-acquired property has been held to sever the wife's joint interest in a fund created by a subsequent deed (*In re Hewett*, [1894] 1 Ch. 362). But it should be noticed that the mere marriage of a woman does not sever a joint-tenancy. This principle has been long recognised with regard to a joint-tenancy of leaseholds (*Co. Litt.* 185 b and 351 a; and see *Bracebridge v. Cook*, Plowd. 416, and *In re Butler's Trusts*, 1888, 38 Ch. D. 286); as regards a joint-tenancy in fee, the point does not seem to have been authoritatively decided till the case of *Palmer v. Rich*, [1897] 1 Ch. 134. Nor does the granting of a lease by the husband of the married woman and the other joint-tenant reserving the rent to the lessors jointly necessarily effect a severance of the wife's joint-tenancy (*Palmer v. Rich*, *ubi supra*).

And it may be laid down as a general rule that in order to cause a severance of a joint-tenancy the act of a joint-tenant must be a disposition amounting at law or *in equity* to an assignment of his share; an intention or declaration of a wish to do is not sufficient. "If the act of a joint-

tenant amounts to a severance it must be such as to preclude him from claiming by survivorship any interest in the subject-matter of the joint-tenancy" (per Stirling, J., in *In re Wilks; Child v. Bulmer*, [1891] 3 Ch. 59). So when a joint-tenant of a fund in Court took out a summons to have his share paid to him, but died before any order had been made on the summons, it was held that nothing had been done by him, or on his behalf, to sever the joint-tenancy; but the Court would probably have held otherwise if an order had been made (*In re Wilks, ubi supra*).

(2) The interest of one of the joint-tenants may be increased by his being sole survivor, in which case he holds the whole estate in severalty, or by acquiring an extra share, in which case there is no longer a unity of interest between him and his co-tenants, and the tenancy becomes a tenancy in common.

(3) Partition may be either by private agreement or under certain statutes. If by agreement, it must be by deed in order to be valid (8 & 9 Vict. c. 106, s. 3). Partition may be effected by the aid of the Court through the Chancery Division. The jurisdiction of the Court was greatly extended by the Partition Acts (31 & 32 Vict. c. 40, amended by 39 & 40 Vict. c. 17), 1868 and 1876. By these Acts the Court *may*, where a partition might have been made, if it appears by reason of the nature of the property to which the suit relates, or of the number of parties interested, or the absence or disability of some, that a sale of the property and distribution of the proceeds would be more beneficial than a partition, direct a sale accordingly (s. 3), and if a sale is requested by parties interested in one half or upwards, the Court *shall*, unless it sees good reasons to the contrary, direct a sale accordingly (s. 4). A frequent, because it is a convenient and inexpensive, mode of effecting partitions is by an order in that behalf obtained from the Board of Agriculture. The statutes regulating this method of partition are the Inclosure Acts. These Acts will be found referred to and stated in detail, sub tit. EXCHANGE. Besides the statutes above mentioned, the Settled Land Acts, 1882-1890, give to tenants for life powers of sale and partition. See PARTITION; TENANTS IN COMMON.

**Jointure.**—See HUSBAND AND WIFE.

**Journals of Parliament.**—See HOUSE OF COMMONS, vol. vi. p. 238; HOUSE OF LORDS, vol. vi. p. 246).

**Journeyman.**—Strictly, a man hired to work by the day; but the term has been extended to denote a workman who, having served an apprenticeship to his particular trade, is supposed to be proficient therein.

**Judge Advocate-General; Judge Advocate.**—The Judge Advocate-General is the officer appointed by patent from the Crown who acts as principal adviser of the Commander-in-Chief of the army in matters relating to the administration of military law, and especially as to courts-martial (*q.v.*). While the government of the army was carried out by the sovereign through a Board of general officers, prior to 1793, when the office of Commander-in-Chief was appointed, the Judge Advocate-General was the secretary and legal adviser of the Board. At that time he

had a seat in Parliament, and was an administrative officer with only nominal judicial functions in relation to courts-martial, and this being so, there was not the objection usually attaching to holders of judicial office having seats in Parliament. In 1806 he became a member of the Government for the purpose of more effectually defending the policy and acts of the Government and the military authorities in their administration of the army. After the appointment of the Commander-in-Chief he ceased to be secretary, but continued to be his chief legal adviser, and he retained his seat in Parliament as a member of the Ministry, who quitted office with each change of administration. This continued until 1892, when the office ceased to be political and was conferred on the President of the Probate, Divorce, and Admiralty Division, in accordance with the recommendation of the Select Committee of 1888 on Army Estimates. There is no salary now attached to the office, and the duties are rarely required to be performed personally by him, only the very important cases of courts-martial being brought before him; the others being dealt with by the legal and military Deputy Judge Advocates-General, of whom there are two, and who are salaried officials of the Judge Advocate-General's department, for whose official acts and appointments he is responsible. Neither the Judge Advocate-General nor these deputies any longer officiate at courts-martial, their functions being now chiefly the reviewing the proceedings of courts-martial in order to secure the due administration of military justice, and the proper protection of the private soldier, in whose interests the office of Judge Advocate-General was originally instituted. So that this department takes no part in the actual preparation, conduct, or management of prosecutions, and in cases of difficulty and importance a solicitor is appointed for these purposes by the Horse Guards. The Courts whose sentences are reviewed are all general and district courts-martial (*q.v.*) in the United Kingdom; and it is upon the advice of the Judge Advocate-General that either the sovereign, as confirming officer of general courts-martial, or the confirming officer of district courts-martial, confirms the sentences of those Courts. Although he is now no longer a minister of the Crown or the Government, yet, as a Privy Councillor, he has direct communication with the sovereign on these questions. This is intended to enable him to hold an independent position in regard to the purely military authorities, and to secure the strict administration of the law.

The proceedings of all general courts-martial held out of the United Kingdom (except in India) for the trial of commissioned officers in cases where such officers are adjudged to suffer death, penal servitude, or to be cashiered, dismissed, or discharged, are also subject to review by the Judge Advocate-General. Moreover, if the officers who hold warrants for convening general courts-martial abroad think fit in other proceedings, they may transmit them to the Judge Advocate-General for his opinion thereon.

As confidential adviser of the Commander-in-Chief, he gives his opinion upon cases of an important character which may be referred to him by presidents of courts-martial and officers in command.

Under the Army Act (Rules of Procedure 97 (A)) the proceedings of a military court-martial, other than a regimental one, are after promulgation forwarded to the office of the Judge Advocate-General in London, and there preserved for not less, in the case of a general court-martial, than seven years, and in the case of any other court-martial, than three years. Within those respective times persons who have been tried by such courts-martial have a right to a copy of the proceedings from the office, including the proceedings with respect to the revision and confirmation, on payment



of the prescribed rate (s. 124). The original proceedings, when produced from the custody of the Judge Advocate-General, or certified copies, are admissible in evidence on their mere production from such custody (s. 165).

The Judge Advocate-General has by his patent the right of appointing deputies with full powers both in the United Kingdom and abroad (with the exception of India) to act as officiating Judge Advocates at all courts-martial where the presence of a Judge Advocate is required, i.e. general and district courts-martial. If not appointed by the Judge Advocate-General, they may be appointed by officers commanding forces abroad who have power to convene such courts-martial. They may be either civilians or military men, but they are usually the latter, possessing a knowledge of military law. In either case the convening officer must obtain the presence and assistance of an officiating Judge Advocate, as this is essential to the jurisdiction of general and district Courts. One of the first duties of the Court is to inquire whether this officer is duly appointed, and is not disqualified for acting at that court-martial; and as to disqualifications of a military advocate, these are the same as exist in the case of any other officer sitting on a court-martial (Rules of Procedure, s. 19 (B)), and though not in terms applicable to civilians, in principle the same rules must be acted on. In case of the death of the officiating Judge Advocate, or if through illness or any other cause he is unable to attend, the Court must adjourn, and the president must report the circumstance to the convening authority, who must either appoint (if he has authority), or obtain the appointment of, a substitute, who will act for the rest of the trial, or until the Judge Advocate returns. After his appointment to a particular court-martial, the Judge Advocate, as well as the convening officer, or president, or commanding officer, may summon witnesses to attend by order under his hand.

At the assembling of the Court he administers the prescribed oath to the members, and then he is himself sworn not to divulge the sentence of the Court until it is duly confirmed, unless in the discharge of his official duties; and not to disclose at any time, or on any account, the vote or opinion of any particular member of the Court, unless required in due course of law. From the time of his appointment the prosecutor and the prisoner respectively are entitled to his opinion on any question of law relative to the charge or trial; but the prisoner has no right of objecting to the Judge Advocate. He is responsible for informing the Court of any informality or irregularity in the proceedings. Whether he is consulted or not, he is to inform the convening officer and the Court of any informality or defect in the charge or in the constitution of the Court, and give his advice on any matter before the Court; and any information or advice given to the Court on any matter before it, may be entered on the proceedings. He records, or causes to be recorded, all the proceedings, and is responsible for the accuracy of the record. At the conclusion of the case, unless both he and the Court think it unnecessary, he sums up the evidence, and gives his opinion upon the legal bearing of the case before the Court deliberates on the finding. Upon any point of law or procedure which arises upon the trial, the Court is to be guided by his opinion, and not overrule it, except for very weighty reasons. He, equally with the president, has the duty of taking care that the prisoner does not suffer any disadvantage in consequence of his position as prisoner, or of his ignorance or incapacity to examine or cross-examine witnesses, or otherwise; for that purpose, he may, with the permission of the Court, call witnesses, and put questions to witnesses which appear to him necessary or desirable to elicit the truth; and

in all things he is to maintain an entirely impartial position. His office is therefore distinct both from that of prosecutor or prisoner's counsel merely. He is not a member of the Court, possessing the right of giving a deliberative opinion for which he may become responsible to a civil Court. He can do no more than submit his opinion; and as he cannot prevent a contrary decision, he is therefore not responsible for it.

When sentence is awarded, the proceedings are signed by the Judge Advocate, and have to be transmitted by him for confirmation by the proper authority, *i.e.* to the Judge Advocate-General's office as above mentioned, for general courts-martial in the United Kingdom; elsewhere, to the General or other officer having power to confirm the findings and sentences of general courts-martial. In the case of district courts-martial the proceedings are sent by him to the confirming officer, who lays them before the Judge Advocate-General for his approval before causing the sentence to be promulgated.

The Judge Advocate-General has no supervision of naval courts-martial, but in the case of the marines he acts as in that of the army proper.

See ARMY; COURTS-MARTIAL; JUDGE ADVOCATE OF THE FLEET; MILITARY LAW; MARTIAL LAW.

[*Authorities.*—Simmons, *Courts Martial*, 6th ed., pp. 192–201; Clode, *Military Forces of the Crown*, vol. i. pp. 359–365; *Manual of Military Law*, War Office, 1894; Select Committee Army Estimates, 1888, First Report.]

**Judge Advocate of the Fleet, or Counsel and Judge Advocate of the Fleet.**—This officer is the chief adviser of the Admiralty upon all legal matters connected with the administration of the military law in the navy, and of the Royal Marines and all other sea-forces when under naval military law (*q.v.*). He was one of the judicial officers of the ancient Court of the Lord High Admiral, and continued to fulfil the same functions after that office was put into Commission (see ADMIRALTY). The Judge Advocate is the holder of two offices, which were separate until the present reign, that of Counsel and Judge Advocate of the Fleet. The salary is now only nominal, and what duties there are are paid by fees. There is no obligation upon the Admiralty to refer the proceedings of naval courts-martial to this officer for review, as in the case of military courts-martial there is to refer them to the Judge Advocate-General (*q.v.*). They are only referred when the Admiralty chooses. The Judge Advocate of the Fleet may be appointed to act at a court-martial, but in most cases the duties thereat are performed by a deputy Judge Advocate appointed by the President of the court-martial, unless the Admiralty or Commander-in-Chief of a fleet or squadron appoint such an official. Upon being appointed he sends notice of the trial to the prosecutor, and to the prisoner, transmitting to the latter a copy of charges made against him, and a copy of the circumstantial letter reporting to the Commander-in-Chief the circumstances on which the charges are founded. Upon obtaining from each the names of the persons whom they desire to have called as witnesses, he issues summonses to secure their attendance, under sec. 66 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109). There must be a Judge Advocate present throughout the trial. He is the assessor of the Court to advise it on the law and procedure, and to see that justice is properly administered.

He reads the order for the assembling of the Court; reads over to the prisoner the names of the members of the Court; and informs him of his

right to challenge any member. The oaths of the members of the Court are administered by him, and the President administers to him the oath of secrecy in regard to the vote or opinion of any particular member of the Court. He administers the oaths to witnesses, and examines or cross-examines if necessary. When the Court is cleared for the purpose of framing the sentence, he draws up the questions whereon to determine the innocence or guilt of the prisoner. He then collects the votes, and draws up the sentence, which is signed by the members and himself; and upon the prisoner being readmitted he pronounces sentence. As soon as may be, he is to transmit the original proceedings, or a complete and authorised copy thereof, and the original sentence, of every court-martial attended by him to the Commander-in-chief or senior officer, who must transmit them to the secretary of the Admiralty. The general rule for his conduct is that he ought to render such assistance to the accused as a judge in a criminal case would afford to a prisoner undefended; and where the prisoner at a court-martial is undefended, he is to take care that the prisoner does not lose any privilege that the law allows him in the conduct of the trial.

He is not responsible in any way as a member of the Court for the sentence.

See ADMIRALTY; ADVOCATE, QUEEN'S; COURTS-MARTIAL; JUDGE ADVOCATE-GENERAL; NAVY.

[*Authorities.*—Thring, *Criminal Law of the Navy*; First Report, Committee on Army Estimates, p. 55.]

**Judge at Chambers.**—It is provided by sec. 39 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), that any judge of the High Court of Justice may, subject to any rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction by the Act vested in the said High Court in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of the Act might have been heard in Court or in Chambers respectively, by a single judge of any of the Courts whose jurisdiction is transferred to the High Court, or as may be directed or authorised to be so heard by any rules of Court to be thereafter made.

The above section has been the subject of judicial interpretation in several cases. In *Baker v. Oakes*, 1877, 2 Q. B. D. 171, an action had been tried with a jury, but at the trial no special direction had been given as to costs. Subsequently an application with regard to the costs was made at Chambers to the judge who had tried the action, who made a special order as to such costs. A Divisional Court rescinded the order as being made without jurisdiction, and that decision was affirmed on appeal. The Court held that, inasmuch as Order 55 of the Rules of the Supreme Court, 1875, provided that the costs of a trial by jury should follow the event, unless upon application made at the trial, the judge before whom such action was tried, or the Court should otherwise order, there was no authority for the exercise by a judge at Chambers of jurisdiction which by the express terms of the rule was exercisable only by a judge at the trial or by the Court. Brett, J.A., expressed the opinion, (1) that to confer such power the phrase "Court or a judge" must be found in the rule; and (2) that sec. 39 does not enable a judge of the High Court to do anything that a judge could not have done before the passing of the Act.

In *Clover v. Adams*, 1881, 6 Q. B. D. 622, an order was made at

Chambers charging a fund in Court with the costs of an action in favour of the plaintiff's solicitor. It was argued that a judge at Chambers could not make the order because of the terms of sec. 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), which provides that the order shall be made by the Court or judge before whom the suit, matter, or proceeding has been heard or shall be depending. The Divisional Court (Grove and Lindley, JJ.) held that the order had been properly made, Grove, J., expressing the view that by the operation of sec. 39 a judge at Chambers has the jurisdiction of the High Court generally, and represents all the Courts, and is therefore a judge before whom the suit is depending; whilst Lindley, J., said that such judge has power to act for the Court generally, unless there are any words to deprive him of it.

In *Salm Kyrburg v. Posnanski*, 1884, 13 Q. B. D. 218, and again in *Amstell v. Lesser*, 1885, 16 Q. B. D. 187, the section was considered, and it was held that the word "respectively" must be read as equivalent to "either," so that its effect is that a judge, either in Court or in Chambers, may do anything that a single judge could do before the Act, either in Court or in Chambers.

In *In re Howell Thomas*, [1893] 1 Q. B. 670, it was contended that, inasmuch as sec. 8 of the Attornies and Solicitors Act, 1870 (33 & 34 Vict. c. 28), provides that applications thereunder to enforce or set aside an agreement shall be made on motion or petition, and since the Judicature Act no single judge of the Queen's Bench Division sits to hear motions, such an application could only be made in Court. The objection was overruled by Charles and Wills, JJ., who held that the general jurisdiction of a single judge to act for the Court was preserved by sec. 39.

The result of the cases on the subject is well summed up in a leading authority on practice thus:—"Practically a judge at Chambers has jurisdiction in all cases where his jurisdiction is not excluded expressly or by necessary implication by some rule or statute. Except under very special circumstances, where both the Court and judge have jurisdiction, the application should be made to the latter. Where a statute expressly or impliedly directs that the application should be made only to the Court, a judge has no power to interfere, and *vice versa*. But where a statute in general terms, and without any special limitation either expressly or to be inferred from its terms, gives any power to the Court, that power may be exercised by a judge at Chambers" (Chitty's *Arch. Pr.* pp. 1401, 1402). See, for a case to the like effect before the Judicature Act, *Smeeton v. Collier*, 1847, 1 Ex. Rep. 457.

A judge sitting in Chambers does not mean that he is sitting in any particular room, but that he is not sitting in open Court (*Hartmont v. Foster*, 1881, 8 Q. B. D. p. 84).

[See also COURT OR A JUDGE; and, as to proceedings at Chambers generally in the Chancery and Queen's Bench Divisions respectively, see CHAMBERS—CHANCERY DIVISION; CHAMBERS, JUDGES].

*Appeals from Orders of Judge at Chambers.*—By sec. 50 of the Judicature Act, 1873, every order made by a judge in Chambers (except as provided by sec. 49, *q.v.*) may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in Court according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned, and no appeal lies from any such order to set aside or discharge where no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal.

The above section must be read in connection with the provisions of the Judicature Act, 1894 (57 & 58 Vict. c. 16), under which (s. 1 (1) (b)) no appeal lies (except by leave of the judge or of the Court of Appeal) from any interlocutory order or interlocutory judgment made or given by a judge, with certain specified exceptions. No appeal lies from an order of a judge giving unconditional leave to defend an action (s. 1 (3)). In matters of procedure and practice every appeal from a judge is to the Court of Appeal (s. 1 (4)).

In the Queen's Bench Division, except in matters of practice or procedure, every appeal to the Court from any decision at Chambers is to a Divisional Court (R. S. C. 1883, Order 54, r. 23), and is by motion to be made within the prescribed time (r. 24). See also Judicature Act, 1894, s. 1 (5).

In the Chancery Division, on the other hand, an appeal from an order of a judge at Chambers lies in all cases to the Court of Appeal, subject of course to the above provisions of the Judicature Act, 1894, s. 1 (1) (b), with regard to leave to appeal from interlocutory orders. In that Division, and in the Probate, Divorce, and Admiralty Division, the provision of sec. 50 of the Judicature Act, 1873 (*supra*), with reference to discharge by a judge sitting in Court of an order made in Chambers, applies. Accordingly, unless the judge, on hearing an application in Chambers, gives a certificate that he requires no further hearing (and such certificate is in practice rarely given), it is usual for the party dissatisfied with an order made in Chambers to move before the judge in Court to discharge it (*Holloway v. Cheston*, 1881, 19 Ch. D. 516). A certificate of the judge will not invariably be required by the Court of Appeal, nor a previous motion to discharge the order, where the Court is satisfied *aliunde* that the case has been fully argued before the Court below (*In re Elsom, Thomas v. Elsom*, 1877, 6 Ch. D. 346).

An application to the judge to discharge an order is a rehearing and not an appeal (*In re Giles, Real and Personal Advance Co. v. Michell*, 1890, 43 Ch. D. 391; *Boake v. Stevenson*, [1895] 1 Ch. 358).

It has been settled by several cases that the analogy of Order 58, r. 15, with regard to the time for appealing from an order made at Chambers will be followed, in deciding whether a motion to discharge an order is made in time, and accordingly such motion must be within fourteen days from the time when the order was first pronounced, or when the party moving first had notice of it (*Dickson v. Harrison*, 1878, 9 Ch. D. 243; *Heatley v. Newton*, 1881, 19 Ch. D. 326; *In re Lewis, Lewis v. Williams*, 1885, 31 Ch. D. 623; *In re Norwich Equitable Co., Brasnett's case*, 1884, 33 W. R. 270; *In re Woodbridge*, 1884, W. N. 187); and the case is the same even though the order be a final one (*In re Johnson, Manchester and Liverpool Banking Co. v. Beales*, 1889, 42 Ch. D. 505; *In re Giles, ubi supra*).

There are three alternative courses in the Chancery Division open to a party dissatisfied with an order made in Chambers: (1) he can move in Court to discharge the order; (2) he can ask to have the matter adjourned from Chambers into Court for argument; (3) he can ask the judge to grant his certificate that no further hearing is required, so as to enable him to go direct to the Court of Appeal (*Boake v. Stevenson*, [1895] 1 Ch. 358).

[*Authorities.*—*The Annual Practice*, 1898; Chitty's *Archbold's Practice*, 14th ed., pp. 1401-1410; Daniell's *Chancery Practice*, 6th ed.]

**Judge Ordinary.**—A title absolutely unknown to the law of England except for a period of less than eighteen years, *i.e.* from the

1st January, 1858 to the 1st November 1875. By the Matrimonial Causes Act, 1857 (21 & 22 Vict. c. 85), the Court for Divorce and Matrimonial Causes was established. By sec. 9 of that Act the judge of the Court of Probate was declared to be the judge ordinary; and by sec. 3 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), he was given precedence in Court next after the Lord Chief Baron. The three holders of the office of judge ordinary were Sir Cresswell Cresswell, formerly a justice of the C. P. (1858-1863); Sir James Plaisted Wilde (now Lord Penzance), formerly a Baron of the Exchequer (1863-1872); and Sir James (afterwards Lord) Hannen, formerly a justice of the Q. B. (1872-1875), who, by the operation of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 31, became the first President (an equally new and un-English style) of the Probate, Divorce, and Admiralty Division of the High Court of Justice, to which the jurisdiction in divorce and matrimonial causes is now assigned.

### Judges' Chambers.—See CHAMBERS, JUDGES'.

**Judge's Notes.**—*Where Verdict wrongly entered.*—A verdict wrongly entered may be amended by the judge by reference to his notes. "It is the ordinary practice," said Tindal, C.J., "when any mistake has arisen at the trial, to apply to the judge to say, by reference to his notes, on what counts the verdict is to be entered" (*Ernest v. Brown*, 1838, 4 Bing. N. C. 162; and see *Doe d. Church v. Perkins*, 1790, 3 T. R. 749; *Richardson v. Mellish*, 1825, 3 Bing. 334; *Ferguson v. Mahon*, 1839, 11 Ad. & E. 179); but the case for amendment must be clear (*Reece v. Lee*, 1822, 7 Moore, 269). Where there was ambiguity in the terms of a judgment with respect to costs, and the Master in consequence refused to tax the costs of one of the parties, it was held that the proper course was to apply for a direction to the judge who tried the cause, and not to appeal (*Abbott v. Andrews*, 1882, 8 Q. B. D. 648; and see *Clack v. Wood*, 1882, 9 Q. B. D. 276). An application to amend may be made at any time (*Petrie v. Hannay*, 1790, 3 T. R. 659); but will not be entertained after great delay (*Harrison v. King*, 1817, 1 Barn. & Ald. 161). See further, Chitty's *Arch. Pr.* pp. 668-670.

**New Trials.**—On applications for new trials, the judge's notes constitute the only authentic information as to the admission or rejection of evidence (*Shedden v. Patrick*, 1869, L. R. 1 H. L. Sc. 470); and evidence will not be admitted to contradict them (*R. v. Grant*, 1834, 3 Nev. & M. 106; *Gibbs v. Pike*, 1842, 9 Mee. & W. 351). Nor will affidavits be received to supply alleged omissions in the judge's notes (*Coles v. Bullman*, 1848, 17 L. J. C. P. 302). Under exceptional circumstances the costs of shorthand notes of the evidence given at the trial were allowed, but a very special case is required to induce the Court to allow such costs on a taxation between party and party (*Watson v. Great Western Ry. Co.*, 1880, 6 Q. B. D. 163).

The party moving must, after serving notice of motion for a new trial, apply to the judge's clerk to have the notes copied, and the clerk will at once prepare a copy for the use of the Court, if required. A stamp of 5s. must be impressed on the application, and a charge of 6d. a folio for copying must also be paid. This is in accordance with the former practice (*Evans v. Roe*, 1872, L. R. 7 C. P. 138). See *Annual Practice*, 1898, p. 759.

It is entirely in the discretion of the judge whether he will allow copies of the notes to be furnished to the parties (*Hemberow v. Post*, 1884, 28 Sol.

J. 708). Under the old practice of the Court of Chancery, it seems that copies were supplied to the parties, by consent (*Hargrave v. Hargrave*, 1846, 10 Jur. 957). See further, Chitty's *Arch. Pr.* p. 748; Daniell's *Ch. Pr.* p. 777.

*On Appeals to the Court of Appeal.*—By Order 58, r. 11, of the Rules of the Supreme Court, 1883, it is provided that, where any question of fact is involved in an appeal, the evidence taken in the Court below shall, subject to any special order, be brought before the Court of Appeal, as to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient. In order to obtain the notes, it is the duty of the appellant to apply to one of the judges of the Court of Appeal, through his clerk, to ask the judge of the Court below to send a copy of his notes to the Court of Appeal. If this is not done, the appeal will be ordered to stand over at the expense of the appellant (*Ellington v. Clark*, 1888, 38 Ch. D. 332). In practice a certificate signed by counsel, stating that the notes are required, has to be produced to the clerk of the judge of Appeal (*Annual Practice*, 1898, p. 1045).

It seems that there is no authority for the Court of Appeal to order copies of the judge's notes, which are confidentially communicated by the judge below, to be supplied to the parties (*Weston v. Sherwell*, 1884, 28 Sol. J. 688).

The notes of the judge are usually sufficient to bring before the Court of Appeal the oral evidence used in the Court below; and therefore the costs of shorthand notes of such evidence will not, except under special circumstances, be allowed (*In re Duchess of Westminster Silver Lead Ore Co.*, 1878, 10 Ch. D. 312; *In re Gee, Laming v. Gee*, 1880, 28 W. R. 217; *Kelly v. Byles*, 1880, 13 Ch. D. 693; *Earl de la Warr v. Miles*, 1881, 19 Ch. D. 80); but the judge's notes may be supplemented, if required, by reference to the shorthand notes (*Orr-Ewing v. Johnston*, 1880, 13 Ch. D. 450), or by the notes of counsel (*Earl de la Warr v. Miles*, 1881, 19 Ch. D. 82). The Court will allow shorthand writer's notes, or notes of counsel taken in the Court below, to be used as representing the impression of the party of what passed, though the judge's notes will be taken to represent rightly the whole effect (*In re Gee, Laming v. Gee*, 1880, 28 W. R. 217).

Where an appellant had by reason of his poverty been unable to take shorthand notes of the evidence in the Court below, the Court of Appeal sent a request to the judge of the Court below for a copy of his notes of the evidence (*Dence v. Mason*, 1876, 41 L. T. 573).

In a case before the Privy Council it was held that, where judge's notes of evidence are mere private memoranda, not taken in pursuance of any law or practice requiring them, it would be improper to have them before a Court of Appeal. Such notes might be misleading to the last degree (*Baudains v. Liquidators of Jersey Banking Co., Ex parte Baudains*, 1888, 13 App. Cas. 832).

See Chitty's *Arch. Pr.* p. 986; Daniell's *Ch. Pr.* p. 1301.

*On Appeals from County Courts.*—By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, it is provided that, at the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter.

By sec. 121 it is further provided, that, in any action or matter in which there is a right of appeal, and the judge has, at the request of either party, made a note of any question of law raised at such trial or hearing, and of

the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter, he shall, at the expense of any person or persons being party or parties in any such action or matter, furnish a copy of the note so taken at the said trial or hearing, or allow a copy to be taken of the same, by or on behalf of such person or persons, and he shall sign such copy, whether a notice of motion in the matter of the said appeal has been served or not, and the copy so signed shall be used and received at the hearing of such appeal.

"The object of the provisions of sec. 120 is clearly to let the opponent of the party who asks for the note to be taken, know what the question of law is, and to give him the opportunity of meeting it by necessary evidence. The judge must be asked to decide the question of law, and it is of great importance that he should be asked to take a note of the evidence relating thereto, both in the interest of the opponent and in order that the Court on appeal shall have a complete and clear record of what the point raised at the trial was, and of the judge's decision upon it" (per Field, J., *Clarkson v. Musgrave*, 1882, 9 Q. B. D. 391, decided under the corresponding section of the County Courts Act, 1875 (38 & 39 Vict. c. 50, s. 6).

The request to the County Court judge to take a note is not sufficient if made at the commencement of the trial, and before any specific question of law has been raised (*Morgan v. Rees*, 1881, 6 Q. B. D. 508). The request must be made during or immediately at the end of the trial (*Pierpoint v. Cartwright*, 1880, 5 C. P. D. 139). The judge is only bound to take a note when a question of law is raised, and he is asked to take a note of that question of law. If there are more questions of law than one, the request to take a note must be made in respect of each (*R. v. Kerr*, 1894, 70 L. T. 595). See *Clifford v. Thames Ironworks, etc., Co.*, [1898] 1 Q. B. 314; and Addenda, vol. xii.

The procedure on appeals is regulated by Order 59 of the Rules of the Supreme Court, 1883, rr. 7-18. But r. 13, which provides that a copy of the judge's notes shall be applied for by the Master of the Crown Office Department, is repealed by sec. 121 of the County Courts Act, 1888. It is now the duty of the appellant, as a condition precedent, to furnish the Court with a copy of the notes (*M'Grah v. Cartwright*, 1889, 23 Q. B. D. 3).

By Order 59, r. 8, on any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior Court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such judge which the Court may deem sufficient.

Under sec. 120 an application to the judge for a note is a condition precedent to any appeal from his decision. The power under r. 8, *supra*, only comes into operation when an application has been made at the trial, and no notes are forthcoming (*Cook v. Gordon*, 1892, 61 L. J. Q. B. 445; and see *Jonas v. Long*, 1888, 36 W. R. 315; but see *Seymour v. Coulson*, 1880, 5 Q. B. D. 359).

Where it was impossible to request the judge to make a note at the time when the point on which the appeal was decided arose, because the point did not arise until the close of the summing up, it was held that the judge was not bound to furnish a copy of his notes, and that the appellant was entitled to obtain and use a transcript of a shorthand note of the evidence (*Barber v. Burt*, [1894] 2 Q. B. 437). If the circumstances be such that there was no possibility of raising the point at the trial or of getting a note, then the appellant may show by affidavit what happened at the trial (*R. v. Kerr*, 1894, 70 L. T. 595). Where no note has been taken, the Divisional Court has jurisdiction to order witnesses of both parties,



called and examined in the Court below, to be produced and examined on the hearing of the appeal; but care ought to be taken to prevent fresh evidence being given, so that such appeal shall not practically become a new trial (*"The Crescent,"* 1893, 41 W. R. 533).

A judgment of the County Court may be upheld on other grounds than those on which the County Court judge proceeded, if they appear and are admitted on his notes (*Chapman v. Knight*, 1880, 5 C. P. D. 308).

See further, *The Annual County Court Practice*, 1898, pp. 408–416; *Chitty's Arch. Pr.* pp. 1523–1525).

[*Authorities.*—*The Annual Practice*, 1898; *The Annual County Court Practice*, 1898; *Chitty's Archbold's Practice*, 14th ed.; *Daniell's Chancery Practice*, 6th ed.]

**Judges, Summons of, to House of Lords.**—See HOUSE OF LORDS, vol. vi. p. 245; PARLIAMENT.

## Judgment.

### TABLE OF CONTENTS.

DEFINITION . . . . .	114	<i>Judgment of Discontinuance, Dis-</i>	
IN CRIMINAL PROCEEDINGS . . . . .	115	<i>missal, etc.</i> . . . . .	120
IN CIVIL PROCEEDINGS . . . . .	116	" <i>on Motion</i> . . . . .	121
<i>Generally</i> . . . . .	116	" <i>Summary</i> . . . . .	121
<i>Final Judgment</i> . . . . .	116	<i>Form and Entry</i> . . . . .	122
<i>Judgment by Consent</i> . . . . .	118	<i>Mistakes</i> . . . . .	123
" <i>by Default</i> . . . . .	119	<i>Proof</i> . . . . .	123
" <i>on the Merits</i> . . . . .	120	<i>Enforcement</i> . . . . .	123

A judgment is the conclusion of a Court declaring the rights or remedies to be recognised or awarded between the parties upon facts found by the Court or jury, or admitted by the parties (*e.g.* on demurrer), or upon their default in the course of proceedings instituted for the redress of a legal injury. To be valid it must be given by a Court having jurisdiction on the subject-matter and be in proper form, and be rendered after the compliance with the necessary formalities, and must deal only with matters actually brought before the Court, whether originally or by amendment before it is given.

The term is in strictness applicable to the formal adjudication of a Court as entered and recorded in writing. It is also frequently applied to the oral or written opinions of the judges pronounced when directing judgment to be entered in a particular way. These are more correctly termed "opinions" of the judges in the United States, and are not embodied in England in the formal judgment of the Court. In France the *motifs* or *considérants* of the judges or their majority are included by way of recital in the judgment entered, with the result of making the judgment read like a very long deed. In Scotland the formal judgment sets forth in detail the findings of fact and law before proceeding to the decree or operative conclusion (see *Shepherd v. Henderson*, 1882, 7 App. Cas. 49). This distinction from the English system is illustrated by Scotch law reports, in which the formal judgment of a Lord Ordinary is expressed in the text, and the opinion of the Lord Ordinary on which the judgment is founded is termed a note, and is usually printed as a note to the case. But while the pronounced opinion of the English Court is not the recorded judgment, it is the effective authority for its record (*Holtby v. Hodgson*, 1890, 24 Q. B. D. 103).

In its original or primary sense "judgment" meant a decision or adjudication of a Court of the common law, whether of record or not, and whether of civil or criminal jurisdiction. In the ecclesiastical Courts such decision was termed a "sentence," and in Courts of equity or of the civil law a "decree." In the definition clause of the Judicature Act, 1873 (c. 66, s. 100), "judgment" is to include "decree" for the purposes of the Judicature Acts only. But this was mainly directed at decrees in equity, which have in substance vanished on the abolition of proceedings by bill and answer; and the term "judgment" in an action even now does not apply to matrimonial causes, in which the statutory procedure still begins by petition and ends in decree (*In re Binstead*, [1893] 1 Q. B. 199).

Under the common law system the term "rule" was used for those orders which were not regarded as judgments in the strict sense, but which emanated from and were enforceable by the authority of the Court. Generally speaking, such rules did not give a right to execution by ordinary common law process directed to the sheriff. Under the Judicature Acts orders and rules are treated as of the same character (1873, c. 66, s. 100; *Walsall Overseers v. L. N. W. Ry. Co.*, 1879, 4 App. Cas. 30), but as distinct from judgments (*Ex parte Chinery*, 1884, 12 Q. B. D. 345). But there is no general provision in these Acts assimilating to "judgments" all orders made under or mentioned in other Acts. So far as execution is concerned this assimilation is effected by sec. 18 of the Judgments Act, 1838.

IN CRIMINAL PROCEEDINGS.—In Courts of record having criminal jurisdiction the final adjudication of the Court is termed the "judgment," and in it is included the "sentence." Where the accused pleads guilty, judgment is given against him "on his own confession." In the event of a demurrer, judgment is entered against the unsuccessful party, unless in the case of a defendant, judgment of *respondent ouster* (or leave to plead over) is given, a judgment no longer known in civil proceedings in England (see *Musgrave v. Pulido*, 1880, 5 App. Cas. 102). Where pleas, such as "autrefois acquit" or "autrefois convict," are successful, the judgment is entered for the accused on the finding of the jury. Where they fail or the indictment is tried without their being raised, judgment is entered on the jury's finding of guilty or not guilty, unless in the case of a special verdict the Court has to decide how it should be entered on the facts found, or unless on a motion in arrest of judgment on the verdict the Court arrests the judgment. At common law it took verdict, judgment, and sentence to make up a conviction, but the present opinion appears to treat conviction as meaning plea or verdict establishing guilt without the added adjudication or sentence (*R. v. Blaby*, [1894] 2 Q. B. 170).

Where no evidence is offered for the Crown the jury are directed to find a verdict of not guilty, and judgment of acquittal is entered. Where the Attorney-General asks that a *nolle prosequi* be entered, it puts an end to the proceedings, but is not equivalent to acquittal, and is no bar in law to fresh proceedings.

In a criminal judgment before such Courts of assize the judgment or sentence runs from the first day of the sessions of the Court, unless specially otherwise directed (*King v. R.*, 1845, 7 Q. B. 782). This rule has been adopted to prevent persons from having their imprisonment lengthened by being tried late in the sessions. In the case of a Court of Quarter Sessions the sentence runs from the time when it is pronounced, unless otherwise ordered (31 & 22 Vict. c. 73, s. 12).

It is not now the practice to draw up a formal record of the judgment.

of these Courts except where they are needed for the purposes of a writ of ERROR. A note of the verdict and sentence is made on the indictment or filed with it (1 Steph. Hist. Cr. 309). Where they are drawn up, errors of fact or law on the judgment roll can be corrected (see *Boaler v. R.*, 1887, 57 L. J. M. C. 85).

When the judgment or conviction has to be proved in other causes, civil or criminal, it is done by a certificate of the conviction drawn up under 14 & 15 Vict. c. 99, s. 13 (*Richardson v. Willis*, 1872, L. R. 8 Ex. 69).

Under the Crown Office Rules of 1886 the provisions regulating judgments apply also to orders and convictions.

The orders of Courts of summary jurisdiction in criminal cases are termed "convictions," and in civil or quasi-civil cases "orders." It used to be the practice to set out in them all the evidence adduced, but this is now unnecessary, and merely formal defects are not now a ground for granting such convictions or orders if, at Quarter Sessions on appeal, or in the High Court on *certiorari* it is shown that sufficient evidence was given to warrant the conviction or order (12 & 13 Vict. c. 45, s. 7). See CERTIORARI.

The judgment, conviction, or order in a criminal cause or matter is conclusive ordinarily only between the Crown and the accused. It does not operate as an estoppel except against a fresh prosecution on the same facts (Int. Act, 1889, s. 33), nor is it even evidence in civil proceedings by a person injured by the crime charged in the criminal proceeding, except in certain cases where a certificate of conviction or dismissal is expressly stated to be a bar to civil proceedings on the same facts. See ESTOPPEL.

IN CIVIL PROCEEDINGS.—In civil proceedings the oral pronouncement of the Court or judge at the hearing does not operate as the judgment of the Court, but as a direction how judgment is to be entered or recorded in the books or rolls of the Court; and it is only the judgment as passed, entered, and recorded that operates as an estoppel or can be made the authority for process of execution.

In the case of a hearing in chambers the judge or officer who hears the matter indorses and initials upon the summons a minute of the order made, upon which the full and formal order, or, in case the order is for leave to sign judgment, the formal judgment is drawn up and signed.

In the case of a hearing in open Court the effect of the opinion of the Court is noted by the officer of the Court, and the formal order drawn up by reference to this note, and the indorsement on the briefs of counsel in the cause or matter. See *Entry*, below.

*Final Judgment.*—The finality of a judgment may be regarded from three points of view—

- (1) Its effect on the rights of the parties;
- (2) The time and mode of challenging it by appeal or otherwise;
- (3) As to the remedies for its enforcement.

(1) Every judgment or order, when drawn up, passed, and entered, puts an end to the controversy with respect to which it was given, whether it be of procedure or merits, unless and until the judgment is discharged, reversed, set aside, or varied according to law. The judge by whom it was pronounced is on entry of the judgment *functus officio*, as it is passed into matter of record, which can be altered only by a higher Court. This is thus expressed in a Scotch Act (6 Geo. IV. c. 120, s. 17): "Every interlocutor of the Lord Ordinary shall be final in the Outer House, subject, however, to the review of the Inner House."

(2) "Final" is also used as meaning "not subject to appeal." Thus decisions of the Queen's Bench Division in a criminal cause or matter are

final and without appeal, except on writ of error and in the class of cases in which that remedy is open; and decisions of the High Court on appeals from any Court or person are final, unless leave to appeal is obtained (1894, c. 16, s. 1 (5)), although the time and mode of appeal may be as for an interlocutory appeal.

(3) For purposes of appeal, judgments, decrees, and orders are put into the same category (1873, c. 66, ss. 19, 100; 1875, c. 77, s. 12); but the time within which the appeal must be brought varies according as the judgment, decree, or order is "final" or "interlocutory."

For the purposes of appeal, orders or judgments are final when they decide the rights of the parties even if they be in form interlocutory—*e.g.* are on summons, motion, or petition in cause or matter other than an action. That is to say, the judgment or order must be one as to which it can be affirmed that a decision either way would put an end to the cause or matter, *i.e.* would be conclusive against plaintiff or defendant. In certain cases it is expressly stated that a judgment given without trial shall be final.

This sense of the term is thus expressed in a Scotch Act (31 & 32 Vict. c. 100, s. 53), whose rubric is "Definition of final judgment": "It shall be held that the whole cause has been decided when an interlocutor is pronounced, which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause . . . although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as decided that expenses, if found due, have not been taxed, modified, or decerned for."

Thus orders striking out a statement of claim are interlocutory only (*Salaman v. Warner*, [1891] 1 Q. B. 734), because the plaintiff can amend and go on. But an order on a summons in a winding up of the company in which there are adjudications of rights and not merely a procedure, is final for this purpose, as is an adjudication on a claim in an administration action (*In re Stockton Co.*, 1879, 10 Ch. D. 335, 349; *In re Crosley*, 1887, 34 Ch. D. 664).

In the absence of specific provision it is for the Court of Appeal to determine whether any given order or judgment is or is not final for purposes of appeal (1873, c. 77, s. 12).

It has been found difficult to establish a satisfactory criterion; but the following instances illustrate what is involved in the term "final" judgment or order:—

(a) Orders dismissing an action (*International Financial Society v. Moscow Gas Co.*, 1878, 7 Ch. D. 241), or an originating summons (*In re Fawsitt*, 1885, 30 Ch. D. 231), even if for want of prosecution (*Whistler v. Hancock*, 1878, 3 Q. B. D. 83), or for failure to appear at the trial (*Armour v. Bate*, [1891] 2 Q. B. 233).

(b) Judgments on motion or admissions in the pleadings (*A.-G. v. G. E. Rwy. Co.*, 1879, 27 W. R. 759).

An order or judgment is "interlocutory" for purposes of appeal—

(a) When it is in a matter of practice or procedure;

(b) When it is an interim order for injunction, *mandamus*, or preservation of property (Order 50);

(c) When a decision in favour of either party on the application on which it is made would not put an end to the proceeding (*Salaman v. Warner*, [1891] 1 Q. B. 734; *Hind v. Hartington*, 1890, 6 T. L. R. 267). It is almost impossible to apply this test satisfactorily, and necessary to refer to the wilderness of single instances collected in *Ann. Pr.* 1898,

p. 1047; and a further cross division is caused by the Judicature Act, 1894 (c. 16, s. 1), which forbids appeals without leave from interlocutory orders or judgments except in certain specified cases, but says that an order refusing a conditional leave to defend an action is not to be deemed an interlocutory order for purpose of sec. 1, though it is, except as to the need of leave to appeal, interlocutory within *Salaman v. Warner*, *supra*.

Orders confirming a certificate of assessment of damages (*A.-G. v. Tomline*, 1880, 15 Ch. D. 152), or depriving of costs the successful party at a trial by jury (*Marsden v. L. and Y. Ry. Co.*, 1881, 7 Q. B. D. 641).

But these by no means suggest a comprehensive definition, and many orders, final in effect, if not appealed against, and deciding the merits, have been held interlocutory for purposes of appeal (see *M'Nair v. Audenshaw Paint Co.*, [1891] 2 Q. B. 502; and APPEALS).

Different considerations arise again as to finality, in determining whether a judgment can be enforced by bankruptcy proceedings.

Final judgment in sec. 4 of the Bankruptcy Act, 1883 (c. 52, as amended by sec. 1 of the Bankruptcy Act, 1890), does not include the following decisions:—

(1) An order to pay costs made against a co-respondent in a divorce suit (*Ex parte Dale*, [1893] 1 Q. B. 199).

(2) An order in bankruptcy setting aside a deed (*Ex parte Official Receiver*, [1895] 1 Q. B. 609).

(3) A Scotch or Irish judgment registered in England under the Judgments Extension Acts, 1868 (*In re a Bankruptcy Notice*, 1898, 14 T. L. R. 175). See FOREIGN JUDGMENTS.

(4) A garnishee order absolute (*Onslow v. Inland Revenue*, 1890, 23 Q. B. D. 465).

(5) A balance order in a compulsory or voluntary winding up (*Ex parte Whinney*, 1884, 13 Q. B. D. 476; *Ex parte Grimwade*, 1886, 17 Q. B. D. 357. But see 1893, c. 58; *Westmoreland, etc., Slate Co. v. Feilden*, [1891] 3 Ch. 15).

(6) An order for alimony against a husband either pending a matrimonial suit (*Ex parte Henderson*, 1888, 20 Q. B. D. 509), or after its conclusion (*Kerr v. Kerr*, [1897] 2 Q. B. 439).

(7) An order dismissing an action for want of prosecution (*In re Riddell*, 1888, 20 Q. B. D. 512).

But the words "final judgment" have been held to include the following cases:—

(a) An order declaring an investment to be a breach of trust, and directing one trustee to indemnify the other, coupled with an order fixing the amount of the indemnity (*In re Poole*, 1890, 63 L. T. 321).

(b) An order directing taxation and payment of costs, though it also includes directions as to accounts and inquiries (*In re Alexander*, [1892] 1 Q. B. 216).

(c) A judgment in an action to enforce an interlocutory order to pay costs (*In re Boyd*, [1895] 1 Q. B. 611).

(d) An award made under a submission to arbitration where leave to enforce it has been obtained from the High Court (*Ex parte Caucasian Trading Corporation*, [1896] 1 Q. B. 368).

(e) A balance order in a winding up of a company was not under the Act of 1883 a final judgment, but is made so by an Act of 1893 (c. 58).

*Judgments by Consent.*—At common law, judgment by consent could be obtained by COGNOVIT ACTIONEM, or by WARRANT OF ATTORNEY, or by Master's order staying proceedings by consent, with a condition that

judgment shall be signed and execution issued if the debt and costs are not paid within a specified time (Chitty, *Archb.*, 14th ed., 1294-96). These processes obviated the need of going to trial, but are in the main superseded by the present procedure for obtaining judgment by default.

Where a judgment or order is entered by consent, i.e. by bargain between the parties properly evidenced, and not by mere submission to the Court, it is final and conclusive, and not the subject of appeal except by special leave (1873, c. 66, s. 49; Order 41, rr. 9, 10), and has the full effect of *res judicata* between the parties (*In re South American, etc., Co.*, [1895] 1 Ch. 37), except in the case of a mere consent to dismiss for want of prosecution or the like (*Magnus v. National Bank*, 1888, 36 W. R. 602). It is not, however, conclusive in bankruptcy proceedings (*Ex parte Lennox*, 1886, 16 Q. B. D. 315; *In re Hawkins*, [1895] 1 Q. B. 404).

The consent in the case of adult parties may be given by counsel or solicitor in the absense of express instructions to the contrary, and the client cannot withdraw it unless there has been mistake (mutual or unilateral), surprise, or absolute lack of authority (*Harvey v. Croydon Union*, 1883, 26 Ch. D. 249), and when judgment has been entered the consent cannot be withdrawn unless given without authority (*Hickman v. Bevens*, [1895] 2 Ch. 638; *Lewis v. Lewis*, 1890, 45 Ch. D. 281). In the case of infant parties the consent requires the leave of the Court (Order 16, r. 21; *Rhodes v. Swithinbank*, 1889, 22 Q. B. D. 577).

A judgment by consent is not a contract, but is evidence thereof with the authority of the judge superadded. If a judgment by consent in an action is based upon and intended to carry out an agreement come to between the parties, it can be set aside by action on any ground on which an agreement in terms of the judgment could be set aside, including mistake; and this even though the order has been passed, entered, and partially acted on and construed by the Court (*Ainsworth v. Wilding*, [1896] 1 Ch. 693; *Wilding v. Sanderson*, [1897] 2 Ch. 535, in which all the authorities are reviewed).

A distinction is drawn between a final judgment and an order not final (*Ainsworth v. Wilding*, [1896] 1 Ch. 673). So far as this applies to orders in chambers, this seems consistent with sec. 50 of the Act of 1873.

A judgment or order by consent will not be drawn up, passed, or entered without evidence of the consent, and must be expressed to be by consent. In the Queen's Bench Division the consent must be initialled by the judge or master.

Consent orders empowering the plaintiff to enter up judgment in a personal action, or to issue execution, must be filed and registered in the Bill of Sale Department of the Central Office within twenty-one days from the date of the order, or it will be void as against other creditors (32 & 33 Vict. c. 62, s. 27; *In re Smith*, 1888, 20 Q. B. D. 321). This does not apply to a consent at the trial (*Ex parte Lennox*, 1886, 16 Q. B. D. 315).

In a few cases, e.g. in Admiralty actions, an agreement in writing between the solicitors of the parties may in certain events be filed, and take effect as an order of Court (Order 52, r. 23).

**Judgment by Default.**—Judgments may be entered by default in the following cases:—

(1) Where the defendant does not appear to answer to a liquidated claim (Order 13, r. 3; *Hughes v. Justin*, [1894] 1 Q. B. 667).

(2) Where the defendant does not deliver a defence to a claim, or a plaintiff does not reply to a counteraction, within the proper time (Order 27, rr. 2-8). This used to be called judgment of *nil dicit*.

(3) In actions for recovery of land, if the defendant fails to appear or to deliver defence, judgment for recovery of possession and costs may be entered for the plaintiff (Order 27, r. 7).

(4) In actions for unliquidated claims, if the defendant fails to appear or deliver a defence, the plaintiff may enter interlocutory judgment, subject to a reference to a Master or other person to assess the damages, or to the issue of a writ of inquiry to the sheriff for the like purpose (Order 27).

(5) Where a party disobeys a peremptory order for particulars (*Davey v. Bentinck*, [1893] 1 Q. B. 185), or an order for discovery by interrogatories or of documents (Order 31, r. 21). In these cases the procedure is adopted as more satisfactory and summary than process for contempt, which is the alternative (*Haigh v. Haigh*, 1886, 31 Ch. D. 478).

(6) Where the plaintiff fails to deliver statement of claim when bound to do so. In this case the judgment is of dismissal for want of prosecution (Order 27, r. 1).

(7) Where the plaintiff or defendant fails to appear at the trial. In the former case the defendant obtains judgment at once on the claim, but must prove any counterclaim. In the latter case the plaintiff must prove his claim (Order 36, rr. 31, 32).

In cases of default of appearance or pleading it is the established practice, if the judgment has been regularly signed, i.e. if the person signing has done so in conformity with the rules of procedure, to require an affidavit of merits. But no time is limited for the application (*Farden v. Richter*, 1889, 23 Q. B. D. 124; *Hammond v. Schofield*, [1891] 1 Q. B. 455).

Where the default is in appearance at the trial, the application must be made within six days of the trial (Order 36, r. 33; *Vint v. Hudspeth*, 1885, 29 Ch. D. 322), but the party has the alternative of appeal (*Armour v. Bate*, [1891] 2 Q. B. 233; see, however, *Walker v. Budden*, 1880, 5 Q. B. D. 267).

Judgments by default are final (subject to the power of setting them aside) where they are in a form which would have made them final if given on the merits.

*Judgment on the Merits.*—A case is said to have been heard on the merits when technical points on matters of procedure are not raised or decided, but the law is applied to the admissions, or in the event of controversy the findings of fact upon which the *litis contestatio* arises. A judgment on the merits operates as an estoppel between the parties and those claiming under them in case of a judgment IN PERSONAM, and against all persons in case of a judgment IN REM. See also ESTOPPEL.

In administration actions, persons cognisant of, but not parties who accept the benefit of, the judgment are estopped by conduct from reopening any question decided (*Wilkinson v. Bates*, [1896] 2 Ch. 788).

When final and complete, the judgment can only be got rid of by appeal, or set aside by action on the ground of the discovery of new and material evidence (*Boswell v. Coaks*, 1894, 6 R. 167, H. L.; *In re Scott v. Alvarez*, [1895] 1 Ch. 596, 622), and is conclusive in all other proceedings between the same parties, but not in bankruptcy. It cannot be impeached in collateral proceedings, but can be set aside by action in case of proved fraud, and instead of the abolished procedure by *audita querela* the unsuccessful party may obtain a stay of execution or other relief on the ground of facts which have arisen too late to be pleaded (Order 42, r. 27).

*Judgment of Discontinuance, Dismissal, etc.*—At common law the technical description of a judgment dismissing the plaintiff's claim on an issue or a

peremptory plea was *nil capiat per breve, aut per billam*, as that of a judgment in his favour in a personal action, where he succeeded on an issue of fact or law other than a dilatory plea, was *quod recuperet*. The English equivalents are—(1) that the action be dismissed; (2) that the plaintiff recover against the defendant.

Dismissal for want of prosecution (see *Default, supra*) was termed *non prosequitur*. At common law the plaintiff could at a trial by jury elect to be nonsuited, i.e. to abandon the trial and sue again. The common law judgment of nonsuit appears now to be abolished, and the entry of a judgment of nonsuit to be equivalent to a dismissal on the merits. But a judge is not entitled to enter such judgment until he has heard the plaintiff's evidence (*Fletcher v. L. N. W. Ry. Co.*, [1892] 1 Q. B. 122).

Another mode of discontinuance was by assenting to judgment of *nolle prosequi*. This term continues only in Crown proceedings. In Crown as in civil proceedings it was not final.

In the case of nonsuit or discontinuance in the same or another Court, if a fresh action is brought it can be stayed till the costs of the first are paid (Order 26, r. 4).

Judgment of *stet processus* is another form of discontinuance entered only by consent, as a judgment of *retraxit*, which was only on the record of withdrawal of the action, and was a bar to future action (*Bowden v. Hume*, 1831, 7 Bing. 716). Withdrawal by consent is now regulated by Order 26, r. 2.

*Judgment on Motion*.—Judgment is obtained on motion only when no other mode of getting it is directed by statute or rule of Court or the *curius curiæ*. The most usual cases are—

(1) When it is desired to set aside the judgment entered at the trial (Order 40, rr. 3-5).

(2) After the determination of questions or issues of fact ordered to be determined in any manner (Order 40, rr. 7, 8).

(3) In default of defence to claim or counterclaim where the claim or counterclaim is not for debt or liquidated demand or for detention of goods or pecuniary damages (Order 27, rr. 11, 12, 14).

(4) On admissions of fact or pleadings, or otherwise (Order 32, r. 6).

Judgments on admissions in the pleadings or in answers to interrogatories or otherwise may be given as to the part of the case admitted without waiting for the determination of other questions open between the parties (Order 32, r. 6). The procedure is by summons or motion; but it is not adopted except in a clear case.

(5) Under the old practice when either party considered that on the law he was entitled to judgment notwithstanding the verdict (*non obstante veredicto*), instead of applying to the judge at *nisi prius* he moved the Court for judgment. The practice lasted in civil cases till the abolition of appeals to Divisional Courts, and now the primary judge must enter judgment according to his view of the law without motion for judgment (Order 36, r. 39).

*Summary Judgment*.—A judgment is summary when some or all stages of the ordinary procedure between the writ or initiatory process and judgment are dispensed with. In certain cases County Courts and justices of the peace are authorised to try civil matters summarily. In the High Court the same result is attained—

(i) On proceedings by way of originating summons, which are really actions without pleadings (*Ann. Pr.* 1898, p. 1098).

(ii) On proceedings upon claims specially indorsed (a) for liquidated



money claims; (b) for recovery of land from tenants whose term has expired or been determined by proper notice to quit (R. S. C., Order 111, r. 6; Order 14).

In the latter proceedings the plaintiff is entitled to apply by summons supported by affidavit for leave to sign final judgment, and the defendant is not let in to defend unless he satisfies the Court that he has a complete or substantial defence. If leave to defend is given the Court may (a) by consent determine the case summarily without appeal, or (b) may order the action to be at once set down without pleadings in a special list for immediate trial. This power is not exercised where the possible defences are obviously of a substantial character and likely to involve a lengthened inquiry.

*Form and Entry.*—In the High Court no judgment roll or record is now made up, nor are judgments enrolled. They are simply entered in the Court books and filed of record. The entry is made by the proper officer of each decision in a book kept for the purpose, *i.e.*—

1. In the Chancery Division by a registrar, who files the original judgment when drawn up and issues a duplicate to the party without fee (Order 62, r. 2).

2. In the Queen's Bench Division (a) in London in the writ, appearance, and judgment department, and (b) in the county in the district registry in which the action was proceeding there (Order 35, r. 1; Order 41, rr. 1, 2). The original is filed and an office copy given to the solicitor. On entering judgment the party must deliver to the officer a copy of the whole of the pleadings in the cause (other than a petition or summons) not filed already on entering any previous judgment in the cause. The judgment is dated of the day on which the necessary documents are filed; except in the case of a judgment pronounced in open Court, in which case the date is that of the pronouncement, unless the Court ante-date or post-date the judgment (Order 41, rr. 3, 4).

Where a party dies after a civil cause has been heard but before judgment pronounced, the judgment may be dated *nunc pro tunc* as of the day of hearing (*Turner v. L. S. W. Ry. Co.*, 1874, L. R. 17 Eq. 561; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554). This power is of great importance in actions which abate by the death of a party.

The official requirements on signing judgments in the Queen's Bench and Chancery Divisions are exhibited in a tabular form in the *Annual Practice*, 1898, pp. 1211–1223. The forms of the judgment itself are to some extent prescribed in Appendix F to the Rules of the Supreme Court; but in the case of Chancery judgments, follow rather the precedents in Seton on *Decrees*. The Probate, Divorce, and Admiralty judgments are not dealt with in the *Annual Practice*, and are in practice regulated without any regard to the Judicature Acts, those as to divorce being wholly unaffected by the R. S. C.

The practice in the Chancery Division inherited from the Court of Chancery is that after the judge has pronounced his opinion on the case and indicated the general lines of the judgment, the registrar takes a note of this and the parties prepare minutes of judgment, upon which and his own notes the registrar settles and draws up the final judgment. Disputes are settled by moving the Court on notice to vary the minutes so as to conform to the judgment as pronounced. This practice is inveterate and excused by the complexity of some Chancery proceedings; but is unnecessary where the judge is at the pains to indicate clearly the outlines of his judgment, and is unknown in the Queen's Bench Division.\* If the judge refuses to

vary the minutes, no appeal lies from his refusal. The only appeal is from the judgment itself (*James v. Jones*, 1892, W. N. 104).

Orders or petitions and judgments or orders in which written admissions of evidence are entered as read may not be passed until the original petition or written admissions of evidence are filed in the Central Office or District Registry, and a note of the fact made on the judgment or order by the proper officer (Order 61, r. 15).

Judgments which require any person to do an act must specify the time after service thereof within which the act must be done. If this is omitted, a supplemental order can be made, and upon the copy for service on the person required to obey the judgment must be indorsed a memorandum to this effect (Order 41, r. 5):—

"If you, the within named, all neglect to obey this judgment by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same."

The rule does not apply to judgments in the Queen's Bench Division for recovery of money (*Hulbert v. Cathcart*, [1894] 1 Q. B. 244), but does apply to all judgments, etc., service whereof is a condition precedent to their enforcement, and especially where the penalty for disobedience is attachment or committal (*Stockton Football Co. v. Gaston*, [1895] 1 Q. B. 453).

Till the formal judgment has been passed and entered, the Court of trial is free to review, rehear, or vary it (*Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *In re Gray*, 1887, 36 Ch. D. 205, 212). When once passed and entered it can be corrected by the Court of trial, if at all, only by application under Order 28, r. 11 (*Blake v. Harvey*, 1885, 29 Ch. D. 827).

In the Chancery Division where the judgment as settled by the registrar appears inconsistent with the order pronounced in Court, the practice is to apply to the judge to vary the minutes before the order is passed and entered (*In re Swire*, 1885, 30 Ch. D. 239).

**Mistakes.**—Clerical mistakes in judgment or orders or errors arising from accidental slips or omissions may at any time be corrected on motion or summons to the Court or a judge without resort to appeal (R. S. C. 1883, Order 28, r. 11).

But a distinction must be drawn between slips or errors in the mechanical process of drawing up a judgment in the office of the Court, and mistakes of law or fact upon which the judgment is founded; for a judgment which has been drawn up and perfected and correctly expresses the result of the opinion of the Court cannot be altered except by appeal.

**Proof.**—Judgments are proved by a certified copy, or by production of the original from the proper custody (Arch. Cr. Pl., 21st ed., 280).

In the case of a decision of the House of Lords the journals of the House or an examined and unstamped copy of the minutes are evidence (*Jones v. Randall*, 1774, 1 Cowp. 17).

**Enforcement.**—For purposes of execution, decrees and orders of Courts of equity; and all rules of Courts of common law, and all orders of the Judge in Lunacy, whereby any sum of money or any costs, charges, or expenses are payable to any person, have since 1838 had the effect of judgments of the Courts of common law, and the persons to whom the money, etc., are payable are put into the position and given the remedies of judgment creditors (1 & 2 Vict. c. 110, s. 18). This enactment was extended in 1850 to decrees of the Chancery Court of Lancaster (13 & 14 Vict. c. 43, s. 2), and in 1855 to that of Durham (18 & 19 Viet. c. 15, s. 2).

As a general rule, there is now no difference between the enforcement of a judgment and that of an order in any cause or matter as against all

persons bound thereby. That is to say that the remedies on a rule or order are the same as they would be under a judgment to the like effect.

The nature of the means of enforcement is discussed under **BANKRUPTCY; EXECUTION; RECEIVER.**

When a judgment has been obtained in England it is not usual to bring a fresh action on the judgment (*Chit. Archb.*, 14th ed., 365), and it is done at the risk of being deprived of costs.

An action on a High Court judgment may not be brought in a County Court (51 & 52 Vict. c. 43, s. 63).

Actions, however, may be and occasionally are brought to enforce orders in lieu of proceeding directly on the order (*In re Boyd*, [1895] 1 Q. B. 611; *Godfrey v. George*, [1896] 1 Q. B. 48; *Norton v. Gregory*, 1895, 73 L. T. 10), probably because when obtained they rank as final judgments for the purpose of proceeding in bankruptcy. And in the case of a declaratory judgment a second action may be brought for violation of the rights declared by the first.

The old common law practice as to making up the record and enrolling the judgment is now obsolete, as it is not now necessary to enrol any judgment or order of the High Court (Order 61, r. 8; *In re Swire*, 1885, 30 Ch. D. 239, 246). The judgment or order becomes enforceable on being passed and entered as directed by Order 41.

This extends to awards under a submission to arbitration if the leave of the Court, i.e. an order from a Master for enforcement, has been obtained (1889, c. 49, s. 12; Order 42, r. 31, s. 1). Under the old practice the submission had to be made a rule of Court.

An order giving leave to sign summary judgment under Order 14 for the amount claimed, not followed up by signing judgment and entering judgment under Order 41, r. 4, gives the judgment creditor no priority over other creditors in an administration action subsequently commenced (*In re Maggi*, 1882, 20 Ch. D. 545; *In re Gurney*, [1896] 2 Ch. 863; and see *Ann. Pr.* 1898).

When a judgment is obtained the causes of action on which it adjudicates are extinguished, or, as it is more usually said, are merged in the judgment (*Ex parte Fewings*, 1883, 25 Ch. D. 338; *Hammond v. Schofield*, [1891] 1 Q. B. 453), and a judgment debt is substituted, which is a debt of record, and carries interest at 4 per cent., and this interest is recoverable as part of the judgment debt (*In re Clagett*, 1888, 36 W. R. 653), and may be levied on a writ of execution issued to enforce the judgment (1 & 2 Vict. c. 110, s. 17; R. S. C. 1883, Order 42, r. 16), or added to the debt for the purpose of bankruptcy proceedings (*In re Lehmann*, 1890, 62 L. T. 941). The interest runs from the time when the judgment is entered up, or in the cases in which judgment is pronounced in open Court from the date of pronouncement, unless the Court ante-dates or post-dates the judgment (Order 41, r. 3; *West Ham Guardians v. Bethnal Green Churchwardens*, [1895] 1 Q. B. 662).

These rules apply to all Courts, and to decrees and orders and rules as well as judgments (1 & 2 Vict. c. 110, s. 18). They supersede the rate of interest, if any, specified in contracts but of which the cause of action arose, unless by the terms of the judgment, if by consent, or by any subsequent agreement for good consideration the rate of interest is increased (*In re European Central Rwy. Co.*, 1877, 4 Ch. D. 33). Where a judgment is removed for purposes of execution from a County Court the interest runs from the date of removal (*R. v. County Court Judge of Essex*, 1887, 18 Q. B. D. 704), and though in case of removal from the Mayor's Court

of London the interest runs from the judgment below. (The removal is effected under 1 & 2 Vict. c. 110, s. 22.)

The Act of 1838 applies not only to the judgment debt, but to all costs ordered to be paid by one party to another under a judgment, decree, rule, or order (*In re Marsden*, 1889, 40 Ch. D. 475, 479), and the interest runs from the date of the judgment, and not from the date of the taxing master's certificate or *allocatur* (*Taylor v. Roe*, [1894] 1 Ch. 413). Where the costs are directed to be raised out of an estate or fund, this rule does not apply unless a special direction is given, or they were taxed and certified before the order to pay. In such a case interest at 4 per cent. may be allowed from the date of the taxing master's certificate (23 & 24 Vict. c. 127, s. 27; *In re Marsden*, 1889, 40 Ch. D. 475).

The Court or jury in cases within 3 & 4 Will. IV. c. 42, s. 28, where interest is properly demanded (*Rhymney Rwy. Co. v. Rhymney Iron Co.*, 1890, 28 Q. B. D. 151) may award interest by way of damages up to the date of judgment at "the current rate," i.e. 5 per cent. (*L. C. & D. Rwy. Co. v. S.-E. Rwy. Co.*, [1892] 1 Ch. 465; see *Phillips v. Homfray*, [1892] 1 Ch. 465).

In the case of judgment on default of appearance in the High Court on a liquidated claim, interest, if claimed, may be awarded at the rate claimed, or if no rate is named at 5 per cent. (Order 13, r. 3).

Under sec. 13 of the Judgments Acts, 1838 (1 & 2 Vict. c. 110), a judgment operated on entry as a charge on the beneficial interests of the judgment debtor in real estate. The section is not expressly repealed. It was in *In re Bailey's Trusts*, 1869, 38 L. J. Ch. 237, held to be impliedly repealed by 27 & 28 Vict. c. 112; but in *Hood-Barrs v. Cathcart*, [1895] 2 Ch. 411, North, J., dissented from this view. It did not operate against mortgagees or purchasers for value without notice, nor could the charge be enforced in equity until a year after entry of judgment, and it gave no preference in bankruptcy unless entered up at least a year before bankruptcy. The meaning and concurrent effect of the two Acts is most obscure and is partially elucidated in *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 275. But apparently the proviso of 27 & 28 Vict. c. 112, s. 1, that a judgment is not to affect land of any tenure until actually delivered in execution, does not affect any remedies by way of equitable substitutes for execution which existed before 1838.

Provision was made for registration of judgments so as to bind realty and chattels real by Acts of 1838 (1 & 2 Vict. c. 110, s. 19), 1839 (2 & 3 Vict. c. 11), 1855 (18 & 19 Vict. c. 55), 1859 (22 & 23 Vict. c. 35, s. 22), 1860 (23 & 24 Vict. c. 38), 1861 (24 & 25 Vict. c. 115, s. 2), 1864 (27 & 28 Vict. c. 112), and 1888 (51 & 52 Vict. c. 51, ss. 4, 5). These Acts apply to all the Courts merged in the High Court and to the Chancery Courts of Durham and Lancaster. Unless registered, the judgment does not operate as a charge in priority to purchasers, mortgagees or creditors, heirs or executors. If the judgment was entered up since July 23, 1860, execution must also be issued and registered, and if entered on since July 29, 1864, the land must be actually delivered in execution. The result of the legislation is to give the judgment creditor no preference unless he issues and executes a writ of *elegit* or obtains equitable execution (*Hood-Barrs v. Cathcart*, No. 5, [1895] 2 Ch. 411), and to make him (if the judgment is unregistered) an unsecured creditor in respect of a simple contract debt bearing interest (*Van Gheluwe v. Nerinx*, 1882, 21 Ch. D. 189).

But in the case of the mortgage or sale of land it is still deemed

expedient to search the register for any judgment or *lis pendens*. The registration, entry of satisfaction, and searches are governed by R. S. C. 1883, Order 61, rr. 22, 23. This applies to County Court judgments as well as to High Court judgments, and when they are against a deceased person they give no priority on administration of assets, and do not affect heirs, executors, or administrators (*In re Turner*, 1864, 33 L. J. Ch. 232; *In re Rigby*, 1864, 33 L. J. Ch. 149). Heirs and executors are protected against unregistered judgments by 23 & 24 Vict. c. 38, s. 2, and writs of execution of judgments do not bind lands unless registered in the Central Office (23 & 24 Vict. c. 38, ss. 1, 2; Order 61, r. 1).

English judgments of superior or inferior Courts may be registered in Scotland and Ireland for purposes of execution there (31 & 32 Vict. c. 54, and 45 & 46 Vict. c. 31), and conversely Scotch or Irish judgments can be registered in England for execution, but not for enforcement by bankruptcy proceedings (*In re a Bankruptcy Notice*, 1898, 14 T. L. R. 175). The procedure is regulated by the above Acts, and by rules as to England of November 14, 1868 (St. R. & O., Rev., vol. vii. p. 363), and as to Scotland of July 11, 1871, and March 7, 1883 (St. R. & O., Rev., vol. vi. pp. 259, 331).

[*Authorities*.—Viner, *Abr. tit. "Judgments"*; Chitty, *Archbold*, 14th ed.; *Ann. Pr.* 1898; *Annual County Court Practice*, 1898.]

**Judgment Creditor**—A person who has obtained judgment against his debtor which remains unsatisfied. For the remedies of a judgment creditor, see DEBTORS ACT; EXECUTION; JUDGMENT DEBTOR.

**Judgment Debtor**—A person against whom a judgment has been obtained and remains unsatisfied. A judgment debtor may be examined as to whether any and what debts are owing to him (Order 42, r. 32, R. S. C. 1883), and if the debt is of the requisite amount he may be made bankrupt if he fails to comply with a bankruptcy notice served upon him by the judgment creditor, or he may be liable to be committed to prison or to have a receiving order made against him on a judgment summons (*q.v.*) under the Debtors Act (*q.v.*). See BANKRUPTCY.

## Judgments Extension.

### TABLE OF CONTENTS.

SCOPE OF ARTICLE . . . . .	126	SPECIAL PROVISIONS AS TO CERTAIN COURTS . . . . .	129
SUPERIOR COURTS OF ENGLAND, SCOTLAND, AND IRELAND . . . . .	127	Mayor's Court . . . . .	129
Statutory Provisions . . . . .	127	Salford Hundred Court . . . . .	129
Practice . . . . .	127	Liverpool Court of Passage . . . . .	129
Effect of Registration . . . . .	127	County Palatine Court of Lancaster . . . . .	129
INFERIOR COURTS OF ENGLAND, SCOTLAND, AND IRELAND . . . . .	128	County Courts . . . . .	129
Statutory Provisions . . . . .	128	Execution by one County Court of Judgment of another County Court . . . . .	130
Practice . . . . .	128		
REMOVAL OF JUDGMENTS FROM INFERIOR COURTS . . . . .	128		
Local Courts of Record . . . . .	128		

### SCOPE OF ARTICLE.

The term "judgments extension" in its strictest sense applies only to procedure under the statutes enabling the party in whose favour a judgment

is entered in a superior or inferior Court in either England, Scotland, or Ireland to register the same in any other of the countries named for the purpose of obtaining execution. But the term is not infrequently applied further to the removal of judgments of County Courts and Local Courts of Record into the High Court for the like purpose of obtaining execution. It is in this general sense that the subject will be here dealt with.

The general jurisdiction of the High Court to remove an action from an inferior Court by writ of *certiorari* (see CERTIORARI) is discretionary and is not ordinarily exercised after judgment (*Walker v. Gann*, 1826, 7 Dow. & Ry. 769; *Kemp v. Balne*, 1844, 13 L. J. Q. B. 149). Although it may be applied after judgment to actions in County Courts (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 151), and in some cases to actions in inferior Courts (*Chitty, Arch.* 1556), it has been practically superseded so far as regards removal of judgments into the High Court from inferior Courts by the several statutes referred to below.

#### THE SUPERIOR COURTS JUDGMENTS EXTENSION ACT.

*Statutory Provisions.*—The Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 1, and the *Regulæ Generales* of Trinity Term, 1868, made under that Act, provide that upon a certificate being obtained of the entry of judgment “for any debt, damages, or costs” in any superior Court of common law in England, the same may be registered in the Court of Common Pleas in Dublin or the office in Edinburgh for the registration of deeds, etc., in the Books of Council and Session, and that upon such registration such certificate “shall be of the same force and effect, and all proceedings shall and may be had and taken on such certificate as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered.”

By sec. 2 of the same Act similar provision is made for the registration and enforcement in England and Scotland of judgments for debt, damages, or costs of any superior Court of common law in Ireland; and by sec. 3 for the registration in England and Ireland of any like judgment of the Court of Session in Scotland.

Prior to the Judicature Acts the Judgments Extension Act applied only to judgments of the common law Courts, but by virtue of the Judicature Act, 1873, s. 76, it applies equally to a judgment of the Chancery Division in England for debt, damages, or costs, and it is the practice to certify such judgments for registration in Scotland or Ireland (see *In re Howe Machine Co.*, 1890, 41 Ch. D. 118). It is not, however, the practice of the Chancery Division in Ireland to certify any judgment for registration in England or Scotland, even though it be only for debt or costs. The extension of such judgment must be obtained by exemplification under 41 Geo. III. c. 90 (see EXEMPLIFICATIONS).

*Practice under the Act.*—The forms of certificate for registration are given in the Schedule to the Act, and will be found in *Chitty's Forms*, p. 385. In England the certificate is signed by the master or district registrar upon filing an affidavit made by the solicitor (not his clerk) verifying the particulars contained in the certificate. The certificate is then transmitted by the solicitor to Scotland or Ireland, as the case may be, for registration and execution. A Scotch or Irish certificate is registered in England at the Central Office.

*Effect of Registration.*—After registration in England, a Scotch or Irish judgment becomes for purposes of execution equivalent to an English

judgment, and gives a new cause of action, and the party subject to it cannot go behind it for the purpose of proving that the debt adjudged to be paid was statute barred (*In re Low*, [1894] 1 Ch. 147). But it is equivalent to an English judgment for purposes of execution only. A judgment summons cannot be issued on it (*In re Watson*, [1893] 1 Q. B. 21).

A bankruptcy notice cannot be issued on a Scotch judgment, registered in England under the Judgments Extension Act (*In re a Bankruptcy Notice*, 1898, 77 L. T. 710).

#### THE INFERIOR COURTS JUDGMENTS EXTENSION ACT.

*Statutory Provisions.*—The Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), extends the principle of the Judgments Extension Act, 1868, to inferior Courts of Great Britain and Ireland. Its effect is similar in all respects to the Act of 1868, and it enables a judgment of an inferior Court in England to be registered in an inferior Court in Scotland or Ireland, and *vice versa*. The "Inferior Court" in the Act includes "County Courts, Civil Bill Courts, and all Courts in England and Ireland having jurisdiction to hear and determine civil causes, other than the High Courts of Justice, and in Ireland Courts of petty sessions and the Court of Bankruptcy, and in Scotland the sheriffs Courts and the Courts held under the Small Debts and Debts Recovery Acts" (s. 2). The Act further provides that where the amount recovered in one country is greater than that which could have been recovered in the corresponding inferior Court of the country in which the judgment is sought to be registered, such judgment may be registered in the superior Court under the Judgments Extension Act, 1868 (s. 9).

It also gives the superior Courts in England and Ireland and the Court of Session in Scotland power by prohibition, injunction, or interdict to stay the enforcement of any judgment registered in an inferior Court under the Act (s. 10).

The Act does not apply to any judgment of an inferior Court in England against any person domiciled in Scotland or Ireland, unless the whole cause of action arises and the obligation ought to have been fulfilled within the district of the inferior Court in which the judgment was obtained, and unless the summons was personally served on the defendant within such district (s. 10). Similar provisions in relation to domicile are made with regard to Scotch and Irish judgments.

*Practice under the Act.*—For the regulations in aid of the above Act, see the County Court Rules, 1889, Order 45; for the practice generally, see *Annual County Courts Practice*, 1898, p. 350; and for forms, see County Court Rules, 1889, Appendix H, Nos. 314, 315, and *Annual County Courts Practice*, 1898, p. 875.

#### REMOVAL OF JUDGMENTS FROM INFERIOR COURTS.

*From Local Courts of Record.*—By the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sched. (9), it is provided that any judgment, rule, or order for a sum of not less than £20 may be removed from any Court to which the Act applies into the High Court by order of a judge of the High Court, and that upon such removal such judgment, rule, or order shall be of the same effect as a judgment, rule, or order of the High Court. This Act has for sums not less than £20 practically superseded the provisions of both the Inferior Courts Act, 1779 (19 Geo. III. c. 70), and of the Judgments Act, 1838 (1 & 2 Vict. c. 110).

The Act was originally applied by Order in Council to the Tolzey Court

and Pie Poudre Court of Bristol, the Courts of Record of Scarborough and Poole, the Salford Hundred Court, and the Mayor's Court, London (Order in Council: *London Gazette*, 27th June 1873; Chitty, *Arch.* 1515).

The order for removal is obtained by *ex parte* application to a Master in chambers upon production of the judgment, rule, or order under the seal of the local Court and signature of the proper officer. The judgment and order are filed at the Central Office, whereupon the judgment can be enforced as a judgment of the High Court.

#### SPECIAL PROVISIONS AS TO CERTAIN COURTS.

*Mayor's Court.*—The above Act is not usually resorted to in the case of the Mayor's Court, London, as this Court has a statutory provision in its own (local) Act by which a judgment can be removed into the High Court without order. Under the Mayor's Court (London) Act, 1857 (20 & 21 Vict. c. clvii.), s. 48, upon filing in the High Court a *præcipe* of the judgment and an affidavit verifying the same, and that the judgment remains unreversed and unsatisfied, execution shall issue, and immediately thereupon the judgment and execution become of the same force and effect as a judgment or execution of the High Court.

*Salford Hundred Court.*—The Salford Hundred Court Procedure Act, 1868 (31 & 32 Vict. c. cxxx.), s. 88, also provides a special procedure for removal of a judgment unto the High Court for purposes of execution, and this procedure is alternative to that under the Borough and Local Courts of Record Act, 1872, *supra*. The application is made in a similar manner to a Master *ex parte* upon the judgment, and an affidavit verifying the same and that it is unsatisfied.

*Liverpool Court of Passage.*—Under the Liverpool Court of Passage Act, 1838 (1 & 2 Vict. c. xcix.), s. 3, the party entitled to the benefit of a judgment of that Court may apply to a Master *ex parte* on the judgment and an affidavit verifying the same, for leave to issue execution on the judgment.

*County Palatine of Lancaster.*—The Court of Chancery of Lancaster Act, 1850 (13 & 14 Vict. c. 48), s. 15, provides for the enforcement by process of the High Court of a decree or order of the Palatine Court against any person liable thereunder who resides or withdraws his person or goods out of the jurisdiction of that Court. The party prosecuting the decree or order may apply by *ex parte* motion in the Chancery Division of the High Court upon a transcript of the decree or order, and an affidavit showing that the party liable is out of the jurisdiction of the Palatine Court, and that the decree or order cannot be enforced, asking that the same may be made a decree or order of the High Court. An order will thereupon be made to that effect, which will give the applicant the costs of the motion (*Duke v. Clarke*, 1894, W. N. 100).

*From County Courts.*—"If a judge of the High Court shall be satisfied that a party against whom judgment for an amount exceeding twenty pounds exclusive of costs, has been obtained in a County Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of *certiorari* to issue to remove the judgment of the County Court into the High Court; and when removed it shall have the same force and effect, and the same proceedings may be had thereon as in the case of a judgment of the High Court; but no action shall be brought upon such judgment" (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 151).

As to the last clause, see *Austin v. Mills*, 1853, 23 L. J. Ex. 40; and as to removal otherwise than by *certiorari*, see *Moreton v. Holt*, 1855, 24 L. J. Ex. 169.



*Execution by one County Court of Judgment of another County Court.—*

By sec. 158 of the County Courts Act, 1888, provision is made for the execution of judgments of a County Court beyond the jurisdiction of that Court, but within the jurisdiction of another County Court. In all cases where a warrant of execution has issued against the goods and chattels of any person or an order for his commitment has been made, and such person or his goods and chattels are out of the jurisdiction of the County Court issuing the warrant, the high bailiff may send the warrant or order to the registrar of any other County Court, and such registrar shall seal the same and issue it to the high bailiff of his Court for execution. The high bailiff of the foreign Court returns the warrant to the high bailiff of the home Court and pays over the proceeds of the execution.

See further as to the procedure to be adopted, County Court Rules, 1889, Order 18, and *Annual County Courts Practice*, 1898, pp. 349, 350, 379.

**Judgment Summons.**—A judgment creditor may proceed against his debtor by a judgment summons under sec. 5 of the Debtors Act, 1869, upon which the debtor may be committed to prison for a term not exceeding six weeks, if it is proved to the satisfaction of the Court that the debtor has, or has had, since the date of the judgment or order made against him for the payment of his debt, the means to pay the same, and has refused or neglected to do so. The Court may, however, on an application for the committal of a judgment debtor decline to commit, and in lieu thereof, with the consent of the judgment creditor, make a receiving order, and in such a case the judgment debtor is deemed to have committed an act of bankruptcy at the time the order is made (Bankruptcy Act, 1883, s. 103 (5)). Committals on judgment summonses may be made either in the High Court by the judge to whom bankruptcy business is assigned, or in the County Court, but only those County Courts which have bankruptcy jurisdiction can, instead of making a committal order, make a receiving order (*ibid.*). See BANKRUPTCY; DEBTORS ACT; EXECUTION.

**Judicature Acts.**—See CONFLICT OF LAW AND EQUITY; SUPREME COURT.

**Judicial Acts.**—The acts of justices of the peace may be either judicial or ministerial. If justices in dealing with a particular matter have to exercise their discretion in arriving at a decision, they are acting judicially; if, on the other hand, they are merely required to do a particular act and are precluded from entering into the merits of the matter, they are said to be acting ministerially. The duty of a magistrate, for instance, in respect to admitting a person to bail is a judicial act, as it involves inquiries on which discretion must be exercised (*Linford v. Fitzroy*, 1849, 13 Q. B. 240). On the other hand, the granting of a certificate of dismissal of a complaint for an assault, under the Offences against the Person Act, 1861, s. 47, is a ministerial act (*Hancock v. Somes*, 1859, 28 L. J. M. C. 196). Judicial acts are generally not performed outside the limits of the justice's county, and ought to be done in open Court. Protection is given to the acts of justices, apparently both judicial and ministerial, in matters within their jurisdiction, unless they have been done maliciously and without reasonable and probable cause (11 & 12 Vict. c. 44, s. 1); but if something

has been done without jurisdiction or in excess of it, no protection can be claimed in respect of it (see Paley, *Summary Convictions*, 7th ed., pp. 19–22, 385 *et seq.*, and title JUSTICE OF THE PEACE).

With respect to judges of superior Courts no action will lie for any of their judicial acts or words, even though done or said maliciously and contrary to good faith and honesty (*Anderson v. Gorrie*, [1895] 1 Q. B. 668).

**Judicial Committee.**—See PRIVY COUNCIL.

**Judicial Discretion.**—See DISCRETION, JUDICIAL.

**Judicial Oath.**—See OATHS.

**Judicial Proceedings.**—Statements made to a magistrate in a matter in which he is not called upon to act judicially or in the discharge of magisterial functions are not judicial proceedings; it was held, therefore, that a person could not in such a case justify the publication of a libel which consisted of a correct report of what was said in the presence of the magistrate as being a report of judicial proceedings (*M'Gregor v. Thwaites*, 1824, 3 Barn. & Cress. 24).

**Judicial Separation.**—The old form of decree under the practice of the Ecclesiastical Courts prior to the passing of the Matrimonial Causes Act, 1857, was a divorce *a mensa et thoro*, i.e. separation from board and bed; but by sec. 2 of that Act (20 & 21 Vict. c. 85) it was enacted that, as soon as it came into operation, all jurisdiction theretofore exercisable by any Ecclesiastical Court in England in respect of divorces *a mensa et thoro*, and in all causes, suits, and matters matrimonial, should cease to be so exercisable, except so far as related to the granting of marriage licences, which were to continue to be granted as if the Act had not been passed. By sec. 7 of the same Act it was provided that no decree should in future be made for a divorce *a mensa et thoro*; but that in all cases in which such a decree might theretofore have been pronounced, the Court established by that Act (now the Probate, Divorce, and Admiralty Division of the High Court of Justice in England) might pronounce a decree for a judicial separation, which was to have the same force and the same consequences as a divorce *a mensa et thoro* had theretofore carried with it. Rules and regulations have from time to time been made, by virtue of sec. 53, regulating the practice and procedure in all cases under the Matrimonial Causes Act, 1857, and subsequent amending Acts, and, by sec. 67, all such rules and regulations must be laid before both Houses of the Legislature within a specified period. Full power is given to the Court to revoke or alter the rules and regulations so made and sanctioned from time to time; and, subject to these rules and regulations, the Court is to proceed and act and give relief on principles and rules, which, in the opinion of the Court, shall be, as nearly as may be, conformable to those previously in force under the old Ecclesiastical Courts in the same class of cases (s. 22). Every suit must now be commenced by petition addressed to the President of the Division, and the petition must be accompanied by an affidavit verifying its contents.

Either husband or wife may petition the Court, and the grounds upon which a judicial separation may be granted are (sec. 16), adultery or cruelty, or desertion without just cause for two years and upwards; and, following the ecclesiastical practice, an attempt to commit sodomy would, if proved to the satisfaction of the Court, be sufficient ground for a judicial separation, as distinguished from a divorce: *Bromley v. Bromley*, 2 Add. 158; *Mogg v. Mogg*, *ibid.* 292.

The defences which may be set up by the respondent vary according to the ground upon which relief is sought, but there is one plea, which, if established, forms an absolute bar in suits for judicial separation founded upon any ground whatsoever. That plea is that the petitioner has committed adultery since the date of the marriage. Herein lies a notable distinction between suits for dissolution of marriage and suits for judicial separation; for whereas adultery, on the part of a petitioner for dissolution, is only a discretionary bar (albeit the discretion is exercised only in exceptional cases), pursuant to the terms of sec. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the same offence absolutely precludes the Court from granting a judicial separation. It is now superfluous to refer to any of the older authorities upon this point, since the law has been laid down by the Court of Appeal in the comparatively recent case of *Otway v. Otway*, 1888, 13 P. D. 141; 57 L. J. 81, P & M.; 59 L. T. Reps. 153. In that case both parties petitioned for a divorce, but, upon the findings, no question was raised as to exercising the discretion conferred by sec. 31. Butt, J., who tried the case, found both parties guilty of adultery, and also found the husband guilty of cruelty of an exceptional kind, and, on this account, and especially in the interests of the children of the marriage, he pronounced a decree of judicial separation in favour of the wife, and gave her the custody of the children. But the Court of Appeal reversed this decree, upon the ground that the question, having resolved itself into one of judicial separation, was governed by the practice of the Ecclesiastical Courts, which had always refused to grant divorces *a mensa et thoro* to persons found guilty of adultery. Lord Justice Cotton, in the course of his judgment, after referring to the particular sections of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), governing the principles and practice in cases of judicial separation, and particularly to sec. 22, which provides that "in all suits and proceedings, other than proceedings to dissolve a marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act," proceeded as follows (p. 46): "It was urged that sec. 22 only refers to matters of practice and procedure; but, in my opinion, although the rules seem to amount to that, yet the point is not a matter of procedure, but of principle. The appeal to us has been simply on the ground that in this case the wife, having been held to have been guilty of adultery, she is in such a position that, having regard to the principles followed by the Ecclesiastical Courts, she could not have obtained a decree for a divorce *a mensa et thoro* under the old law. A number of cases have been cited to us, by which it was laid down, without a break at all, that a husband guilty of adultery could not maintain any proceedings against his wife in the old Ecclesiastical Courts for a divorce *a mensa et thoro*. But then it was contended that there is no decision of the old Ecclesiastical Courts, that, where a husband has been guilty of cruelty, the adultery of his wife will prevent her from obtaining

relief in respect of that cruelty, and from obtaining a divorce *a mensa et thoro*; and, therefore, that there is no reason to preclude the wife from coming to the Court in this case and obtaining a judicial separation. . . . The matter was not at all argued before Butt, J., and therefore we have not the benefit of his consideration of the question. It is very true that there is no decision of the old Ecclesiastical Courts bearing on the question; but we have a decision exactly in point by Sir Cresswell Cresswell, in which, acting on the principles of the old Ecclesiastical Courts, he decided that although cruelty was proved, yet, as the wife was guilty of adultery, she could not get any decree for judicial separation as against her husband. That is the case of *Drummond v. Drummond*, 1861, 2 Sw. & Tr. 269; 39 L. J. 177, P. & M. . . . Is there anything which ought to induce us not to follow that decision?" In the result, that decision was approved and followed by the Court of Appeal. As to judicial separations under the Summary Jurisdiction (Married Women) Act, 1895, see *DESERTION OF WIFE AND CHILDREN*, vol. iv. p. 230.

[*Authorities.*—In addition to the authorities appended to the articles *ALIMONY*, *DIVORCE*, see Lushington's *Summary Jurisdiction (Married Women) Act*, 1895, and Browne and Powles' *Law of Divorce*, 6th ed.]

**Judicial Trustee.**—A judicial trustee is a trustee appointed by the Court under the Judicial Trustees Act, 1896, and the Judicial Trustees Rules, 1897. This Act practically introduces into England for private trusts the Scotch system of judicial factors. The judicial trustee is appointed and supervised in various ways by the Court; he may be paid for his services, and has easy access to the Court. So far, no English cases have been decided on the Act or Rules. But see *Hutton v. Annan*, W. N. 1898, 20.

The Court may in its discretion—on the application of a trustee or beneficiary or person creating or intending to create a trust—appoint a person (called a judicial trustee) to be a trustee of that trust, jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees (s. 1 (1)). As at present there are no provisions to guide a judicial trustee in his dealings with a private co-trustee, it is possible that some inconvenience may arise.

*The following Persons may be appointed:*—(1) Any fit and proper person named in the application (s. 1 (3)). The Court is not precluded from appointing a beneficiary, or a relation or husband or wife of a beneficiary, or a solicitor to the trust or to the trustee or to any beneficiary, or a married woman, or a person standing in any special position to the trust, or a person already a trustee of the trust (r. 5).

(2) An official—usually the official solicitor—of the Court in the absence of any or a fit nomination, and sometimes on the discharge of a judicial trustee (s. 1 (3), rr. 7 and 23 (2)). He is called an official judicial trustee. Rule 26 forbids appointment of such a trustee for any persons in relation to a club or company, and specially provides for the carrying on of a trade or business. He may be subject to Treasury Rules as to the banking account and the application of remuneration (r. 10 (8) and r. 18).

*Mode of Appointment.*—1. The application is made in the Chancery Division and by *originating summons*, or, if in a pending cause or matter, as part of the relief claimed, or by ordinary summons (r. 2).

2. The summons has to be *served* on the trustees and such of the beneficiaries (if any) as the Court directs. The Court may dispense with service or require service on other persons (r. 3 (1 and 3)).

3. Applicant on taking out an originating summons must supply a written statement containing various *particulars*, e.g. whether the trustee is to be remunerated or not. Applicant's affidavit verifying his statement is sufficient *prima facie* evidence of the particulars (r. 4).

4. On the appointment, the Court makes the necessary *vesting orders* (r. 6).

*His Duties are*—1. To furnish the Court with a complete statement of the trust property, and to correct it from time to time (r. 8).

2. To give security, with sureties, unless he is an official of the Court, or the Court dispenses with it. The appointment does not take effect until the security is given (r. 9).

3. To keep a separate trust account at a bank approved by the Court (r. 10).

4. To pay all trust moneys coming into his hands into the bank. He is liable to pay interest at 5 per cent. on money unnecessarily remaining in his hands (r. 11).

5. To deposit in the names of the trustees all documents of title with that bank or in such other custody as the Court directs; to give notice to the bank not to deliver over the deeds save on request signed by the judicial trustee and the officer of the Court, and to allow inspection by any person authorised by the officer of the Court; and to give a list of the documents to the Court (r. 10 (2, 3, 4)).

6. To annually make up and deliver accounts before the dates fixed by the Court, for audit by the officer of the Court or a professional accountant (r. 14).

*Remuneration, etc.*—He is allowed (unless the Court otherwise orders) deductions on audit for—

(i.) *Remuneration*—where he is to be remunerated—at the rate fixed by the Court, regard being had to the duties entailed on him (r. 17 (1 and 2)). The Court may order the remuneration to be wholly or partially forfeited, if he has misconducted himself in relation to the trust (r. 19).

(ii.) *Special Allowances* which the Court may make—(1) for the statement of the trust property, not exceeding ten guineas; and (2) for realising or reinvesting the trust property, not exceeding a fixed percentage; and (3) if satisfied that in that year more trouble has been thrown on the trustee by exceptional circumstances than would ordinarily be involved in the administration of the trust (r. 17 (3)).

(iii.) *Fees* paid by him under the rules (r. 16). These are determined by the schedule to the rules, and paid out of income. But no deduction is allowed for professional assistance or personal work or outlay, unless the Court has authorised the deduction or is satisfied that it is justified by the strict necessity of the case (r. 16).

*Removal or Retirement, etc.*—The Court may, if it considers it expedient in the interests of the trust, on or without application of any interested party—(1) *suspend* a judicial trustee (r. 20 (1)), or (2) *remove* him—but only on an application for the purpose by summons or after the Court has given him notice (r. 21 (1–3)). In both cases the Court gives directions necessary for the security of the trust property (r. 20 (2) and 21 (4)).

A judicial trustee desiring to be *discharged* must give notice to the Court, stating proposals as to the appointment of a successor (r. 23).

The Court may at any time after ascertaining the wishes of persons interested in the trust, on the application by summons of any such person, order that there shall cease to be a judicial trustee of a trust. The Court must accede to the application, if satisfied that all persons interested concur.

*Exercise of the Powers of the Court.*—A judicial trustee is subject to the control and supervision of the Court as an officer thereof (s. 1 (3)). The Court may, on or without request, give him *directions* in regard to the trust or its administration (s. 1 (4)); such directions he may request at any time, on sending the fee and a statement of facts (r. 12). The Court may also direct an *inquiry* (conducted by the officer of the Court, unless otherwise specially ordered) into the administration by or dealings of the judicial trustee (s. 1 (6) and r. 22).

For the purposes of the Act or Rules, *the officer of the Court* (i.e. in the High Court the Chancery Master, in a District Registry or a Palatine or County Court any registrar) may exercise any power of the Court, including that of ordering the appointment of a judicial trustee and of making vesting orders, and hear any matter which may be heard by the Court. Any party, however, has the right to bring any particular point before the judge (rr. 27 and 33). Thus Order 55, r. 15 *a*, does not apply to the appointment of a judicial trustee, nor to an order vesting the trust property in him.

As to the *procedure*. No summons need be taken out for any purpose under the Act or Rules, save where required by the rules or directed by the Court. A judicial trustee may apply to, or communicate with, the Court by letter addressed to the officer of the Court, who may give directions by letter (r. 28 (1 and 2)), or require attendance at chambers (r. 12 (3)).

Rules 29–31 specially provide for the jurisdiction of and procedure in District Registries and Palatine and County Courts. In County Courts the jurisdiction is limited to cases where the trust property does not exceed £500, and to Metropolitan Courts or those having bankruptcy jurisdiction, and the procedure is by petition in lieu of summons (r. 31 (1) and (4)).

[*Authorities.*—See T. A. Romer, *Judicial Trustees' Guide*, 1898; and G. J. Wheeler, *The Judicial Trustees Act*, 1896.]

**Junction.**—Where a railway company is authorised by its special Act to make a junction between its railway and any other railway, all interferences with the works of the latter company are to be carried out under the superintendence of its engineer, and in case there is any dispute as to the mode of effecting the junction the matter is to be determined by a referee appointed by the Board of Trade on the application of either party at the cost of the company making the junction (Railways Clauses Act, 1863, s. 9). Unless otherwise provided by agreement or by the terms of the special Act, the company effecting the junction may only purchase easements in the land of the other company (s. 10), and it is not to interfere with the works of the other company more than is necessary (s. 11). The company with whose line the junction is effected may erect and maintain such signals, etc., as may be necessary for the safe working of the junction, and the expenses thus entailed are to be paid by the company making the junction (s. 12). See RAILWAY.

Any junction of a light railway authorised under the Light Railways Act, 1896, must, as far as in the opinion of the Board of Trade may be reasonably practicable, be so made as to avoid interference with lines of rails used for passenger traffic, (Light Railways Act, 1896, s. 23). See LIGHT RAILWAYS.

**Junior.**—“Junior” is no part of a person’s name, but the fact that a person, who ordinarily signs his name with this addition, has added it to

his signature on an election nomination paper does not invalidate such paper, although on the register of electors the name of the nominator is entered without such addition (*Gledhill v. Crowther*, 1889, 23 Q. B. D. 136).

**Jura regalia**—Royal rights or prerogatives. See LANCASTER, DUCHY AND COUNTY PALATINE OF.

**Jurat.**—See OATHS.

**Jurats.**—See CHANNEL ISLANDS.

**Jurisdiction.**—The word "jurisdiction" is used in English law to denote both the authority of a Court or a judge, and the territorial limits within which it is exerciseable. The chief heads of law covered by the term "jurisdiction" will be found treated in this work in such articles as FOREIGN DIVORCE, FOREIGN JUDGMENT, FOREIGN MARRIAGE, SERVICE OUT OF THE JURISDICTION, etc.; and see COMPETENCE.

**Jurisdictional Waters.**—It would tend, says Sir Travers Twiss, to greater clearness, if jurists were to confine the use of the term *maritime territory* to the actual coasts of a nation or to those portions of the sea *intra fauces terræ* over which a nation is entitled to exclusive jurisdiction, and over which its territorial law has paramount force and operation; and if they were to designate the extent of tidal waters over which the territorial law of a nation operates concurrently with the law of nations, as its jurisdictional waters (*Law of Nations in Time of Peace*, Lond. 1892, p. 293). Sir T. Twiss cites in support of the use of this expression, Mr. Justice Story, who used it in his judgment in the schooner *Fame*, 3 Mason's American Reports, p. 152. The more common designation of the waters in question is territorial waters (*q.v.*).

## Jurisprudence.

### TABLE OF CONTENTS.

JURISPRUDENCE . . . . .	136	PUBLIC LAW (similarly distributed)	142
Definition and Nature of . . . .	136	Viz. Constitutional, Administrative, Criminal, of Criminal	
LAW . . . . .	137	Procedure, of the State as a	
Sources and Objects of . . . .	137	Juristic Person, of Procedure	
RIGHTS . . . . .	137	by and against it as such . . . .	142
Analysis and Classification of, resulting in a Division of Law .	137	INTERNATIONAL LAW (similarly distributed)	142
PRIVATE LAW (Substantive and Adjective) . . . . .	139	Dealing with States, their Rights in Peace, Belligerency, Neutrality . . . . .	143
Dealing with Rights "Normal" and "Abnormal," "Antecedent" and "Remedial," "in rem" and "in personam" . . . . .	140	THE APPLICATION OF LAW . . . .	143

### JURISPRUDENCE.

Jurisprudence is the science of law. The term, which is now properly employed only in this technical sense, has also been employed in

various other senses, respectively suggested by etymology, by historical accident, or by the pursuit of euphony. Etymologically, "iurisprudentia," like "iuris scientia," originally denoted merely such a knowledge of the laws of his country as was possessed by a practising lawyer at Rome. By historical accident, "jurisprudence" has come to mean in France the decisions of the Courts. In popular English, one perpetually encounters such phrases as "Spanish," "equity," or "medical" "jurisprudence"; when the writer wishes to express by these sonorous appellations nothing more than "the law of Spain," "the decisions of Courts of equity," or "such medical facts as may have to be discussed in the course of judicial inquiries." But the use of the term in a specific and technical sense is indispensable. As so used, it is the name of the science which defines legal conceptions, and classifies them in accordance with their observed affinities. The province of jurisprudence is therefore to determine what is meant by "law" ("ius"), what are its sources and species, and what are the objects which it subserves.

### LAW.

It is sufficiently obvious that the "law" with which jurisprudence is concerned is not that orderly recurrence which is remarked in the operation of physical forces. But, unless the term is to be so emptied of any precise meaning as to unfit it for scientific use, "law" must be distinguished, no less sharply, also from morality. Most of the confusion which has beset the study of jurisprudence, and in particular the misleading fiction of a "law of Nature," is attributable to the non-recognition of a hard-and-fast dividing line between law and ethics. The line must be drawn between those bodies of rules which do, and those bodies of rules which do not, rest upon the authority of a sovereign State. The former must alone be described as "law"; and as being, or having been, thus actually imposed by a State, they are described, to distinguish them from rules which have merely been thought suitable to be so imposed, as "positive law."

It must be further remarked that jurisprudence is primarily concerned not with the contents or matter of laws, but with their types or forms; *e.g.* not with the question whether the period of prescription is twelve years or twenty, but with the existence and significance of "prescription" as a legal category. The complete definition of jurisprudence is therefore: "the formal science of positive law." This precise conception of the science is mainly due to English thinkers, whose succession may be traced from Hobbes through Bentham and Austin to writers of the present day. Continental writers, so far as they have isolated the topic from the treatment of a given legal system, have tended to identify it with speculations upon a "law of Nature," and to obliterate the boundaries which separate law from social observances and moral habits.

*The source* of law, in the sense of the sanction which enforces it, is in every case, as we have already seen, the authority of a State. But the rules which are, either immediately or eventually, thus enforced came into existence in many ways other than by deliberate State action. The "sources of law," in this sense, are not only legislation and judicial decision, both of which may be taken to be acts of the State itself, but also custom, religion, scientific discussion, and equity.

### RIGHTS.

*The object* of law is the creation and protection of legal rights.

*A right*, in the widest sense, is nothing more nor less than the capacity



enjoyed by one man of influencing the acts of another, by means, not of his own strength, but of the opinion, or the force, of society.

A *legal right* is a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others. We in English are happily spared the ambiguity caused in many languages by the existence of only one term ("Ius," "Recht," "Diritto," "Derecho," or "Droit") to express the two ideas of "law," in the abstract, and of a concrete "right." Every legal right implies a correlative legal duty. When the State will compel B. to carry out, either by act or forbearance, the wishes of A., it matters not whether we say that A. has a legal right, or that B. is under a legal duty.

A right will be found on analysis to consist of the following elements: (1) a person, in whom the right resides, whom we will call "the person of inherence"; (2) in many, but not in all cases, an object, over which the right is exercised; (3) acts or forbearances, which the person of inherence is entitled to exact; (4) a person, from whom these acts and forbearances can be exacted, in other words, whose duty it is to act or forbear for the benefit of the person of inherence. We may call him "the person of incidence." The occupier of land, for example, has a right that no one shall trespass over his close. Here the occupier is the "person of inherence," the land is the "object," the "forbearance" which may be exacted is abstention from trespassing, and the "person of incidence" is all the world. So in the case of domestic service, the servant is the "person of inherence," the "act" to which he is entitled is the payment of his wages, and "the person of incidence" is his employer. In accordance with the variations in any one of these four elements, the character of a right varies, and the variations in its character give rise to the main heads or departments of law. Thus far we have been dealing with a right conceived of as at rest. But it may be put in motion (created, transferred, or extinguished) by "facts," which include not only the "acts" of persons, but also "events" independent of volition. For the full understanding of a right, it is therefore necessary to consider closely the meaning of the following conceptions:—*Persons*, distinguishing "natural" persons, *i.e.* human beings, from "artificial" persons, *e.g.* corporations; distinguishing also, among natural persons, such as are fully capable and responsible (we may call them "normal") from those whose capacity and responsibility is undeveloped, or otherwise limited, as is the case with slaves, lunatics, or minors:—*Things*, distinguishing "physical" objects, such as houses or money, from "artificial things" ("res incorporales"), such as a usufruct, the estate of a bankrupt, or a copyright; distinguishing also things "moveable" and "immoveable," "divisible" and "indivisible," "fungible" and "non-fungible," "principal" and "accessory":—*Facts*, and herein of *events*, such as a landslip, or the death of a relation, and *acts*, *i.e.* determinations of the will, producing an effect in the sensible world. With reference to acts, it is necessary to consider the amount of volition which they imply, and so to distinguish between "intention," "negligence," and "accident"; to touch upon the effects which may be produced upon the will by "fraud" and "duress"; and to discuss the expression of will by means of an "agent." Special attention must be devoted to that species of act which is intended to produce a legal result, and is known as a "juristic act" (*Rechtsgeschäft*). It may be "one-sided," as in the making of a will, or "two-sided," as in the sale of goods. What may appear to be a juristic act may prove to be so deficient in the characteristics which it should possess as to be "void" *ab initio*, or the flaws in its inception may be such as merely to render it "voidable." Under the head of "facts," it

would be proper to discuss succession, testate and intestate. The sphere within which each right is exerciseable may be called its "orbit," and any act of a stranger infringing upon this orbit is an "infringement" of the right. Certain variations in the structure of a right are of such far-reaching importance as to demand immediate attention. (1) The person, whether of inherence or of incidence, may be "public," i.e. the State, or, as is more ordinarily the case, "private," i.e. a human being (or an artificial entity assimilated to such). (2) The person, whether of inherence or of incidence, may be "normal" or "abnormal." (3) The person of incidence may be all the world or a definitely ascertained individual; and the right is accordingly said to be either "*in rem*" or "*in personam*." (4) The act required may be due for its own sake, and in any case, or may be due only in default of another act; and the right is accordingly said to be "antecedent" or "remedial."

After so far investigating the general characteristics of rights, we are in a position to classify the departments of law which exist for their protection; and we shall find that the radical classification of law turns upon the public or private character of the personal element in the right to be protected. When both the person of inherence and the person of incidence are private individuals (or artificial entities assimilated to such), and the State is concerned only as arbiter of the differences which may arise between them, we have "private law," which is law in its typically perfect form. When one of the persons concerned is the State itself, which must thus, in any controversies which may arise, act as both judge and party, we have "public law." Where both of the persons concerned are sovereign States, owning no common superior, we have what is conveniently described as "international law," although it can be so described only by analogy. If "law" be defined as we have defined it, law without a political arbiter by which it can be enforced is a contradiction in terms.

We have already mentioned that law not only defines rights, but also prescribes the mode in which they may be enforced. As defining, it is "substantive" law; as enforcing, it is "adjective" law, or "procedure." We shall accordingly find that in each of the great departments of law, as divided into "private," "public," and "international," there is a "substantive" and also an "adjective" branch.

It is in accordance with these distinctions that we shall proceed to classify in detail the rights which are known to the law; assuming throughout that the reader is familiar with the more general distinctions, already explained, between rights "normal" and "abnormal," "antecedent" and "remedial," "*in rem*" and "*in personam*." Our classification can be little more than a catalogue, but it would be the business of a system of jurisprudence to explain carefully the nature of each of the rights mentioned, stating how it may be acquired and lost, and how, if at all, it is capable of being transferred.

#### PRIVATE LAW,

*Substantive*, defines the rights of private persons; which rights, when unaffected by peculiarities of *status*, are *normal*. These again, when given for their own sake (i.e. not by way of compensation for any wrong-doing), are *antecedent*. Among antecedent normal rights, those which first call for consideration are such as, being available against all the world, are commonly known as rights *in rem*. They may be enumerated as follows:—  
I. *To personal safety and freedom*; and here it would be necessary to inquire under what circumstances the right may be forfeited or waived. II. *To*

the society and control of one's family and dependants; for the understanding of which it is necessary to investigate marriage, parental authority, guardianship, and slavery. III. *To one's good name.* IV. *To the enjoyment of the advantages ordinarily open to all the inhabitants of a country;* such as are: the unmolested pursuit of one's trade or occupation, the free use of the highways, and freedom from malicious vexation by legal process. V. *To one's property;* and herein of the large and difficult topics of "possession" and "ownership." Under the latter topic it will be necessary to consider the applicability of the right to objects which have no physical existence, but are mere collections of rights ("res incorporales") which it is convenient to treat upon the analogy of physical objects; such as are copyrights, trade marks, franchises, and universal successions. Under ownership must also come the large topic of "titles," or "modes of acquisition"; and a discussion of those rights, the enjoyment of which may be severed from ownership ("iura in re aliena"), of which the more important are "pledge" and "servitude." VI. *Not to be induced by fraud to consent to one's own detriment;* as when one is induced by false statements in a prospectus to take shares in an insolvent company.

Antecedent rights *in personam*, as contrasted with those hitherto considered, are available, not against all the world, but against a definitely ascertained individual. When a right of the latter kind is present, there exists between the person of inherence and the person of incidence a tie, described by the Roman lawyers as "*vinculum iuris*," or "*obligatio*"; the essence of which, as Paulus well observes, "*non in eo consistit ut aliquod corpus nostrum faciat, sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel præstandum.*"<sup>1</sup>

Such rights are divisible into two great classes, as they are either conferred by the law, independently of the will of the parties concerned, or arise out of the agreement of the parties.

I. The former class, said by the Roman lawyers to arise "*ex variis causarum figuris*," or "*quasi ex contractu*," may be subdivided into four groups, viz. (1) *domestic*, wherein the mutual rights and duties of husband and wife, guardian and ward, and the like will require consideration; (2) *fiduciary*; (3) *meritorious*, wherein of "*negotiorum gestio*" and "*salvage*"; (4) *official*, wherein of the right of any one of the public to the services of public functionaries, as occasion may arise, as also to those of persons engaged in certain trades.

II. But by far the more important antecedent rights *in personam* are those which arise out of *contract*; the essential character and requirements of which have been the subject of many controversies, especially as to the necessity of the *consensus ad idem* of the parties; as to the exchange of offer and acceptance when the parties are at a distance; as to the cases in which formalities are required; as to the effect of duress, fraud, and mistake; as to agency. Contracts are either *principal*, which are entered into without an ulterior object, and are subdivisible according to their object, which may be, for instance, *alienation*, *use*, *service*, or *insurance*; or *accessory*, which are entered into only for the better carrying out of a principal contract. Such are *guarantee*, *ratification*, *warranty* or *pledge*.

The transfer of rights *in personam* has always been more sparingly per-

<sup>1</sup> Roman law, adopting as the radical distinction between rights that which depends upon (as we should say) the restricted or unrestricted character of the person of incidence, draws little distinction between the rights against a specified individual which (to use our proposed nomenclature) are "antecedent," and those which are "remedial." Contract and delict equally result in obligation.

mitted than that of rights *in rem*, as is expressed by the maxim of English law, that "choses in action are not assignable"; with which may be compared the statement of Gaius, "Obligaciones, quoquo modo contractæ, nihil eorum recipiunt." Such transfer as is allowed takes place either (1) by "act of law," as when most of the rights and liabilities of a bankrupt pass to his trustee in bankruptcy, or of a deceased person to his executor: among the rights and liabilities which do not thus pass are those arising from family relations, or from engagements closely connected with the personal characteristics of either party, such as to marry or to paint a picture; or (2) by "act of party." The inconveniences of the prohibition in early legal systems of this mode of transfer brought about the resort to such clumsy contrivances as "novatio" and "cessio actionum" in Roman law, and in English law have resulted in the assignability of certain covenants between landlord and tenant, and in the liberal concession contained in secs. 25 and 26 of the Judicature Act, 1873. In the interest of commerce, "negotiable instruments" have long been fully assignable.

Rights *in personam* are terminated, the "vinculum iuris" between the parties is untied ("obligatio solvitur") by circumstances which may be classified as: (1) performance; (2) events excusing performance; (3) substitutes for performance; (4) release of performance; (5) non-performance or breach.

*Remedial normal Rights* are given by the law to all whose antecedent rights are infringed by wrong-doing. Law endeavours, as far as possible, to restore the balance between the parties concerned, by enabling the person of inherence to exact either notification or compensation from the wrong-doer. It so enables him, either by permitting him to redress his own grievance, by some process of self-help, such as the forcible ejectment of a trespasser, or the recovery of rent due by means of a distress; or by conferring upon him a right realisable by means of the law Courts ("right of action"), to pecuniary compensation, to the cancelling of an agreement, or to "specific performance." The originating causes of remedial rights are always infringements of antecedent rights, and may be classified accordingly. The most important distinction is between "delicts" or "torts," most of which—such as, for instance, assault, deceit, malicious prosecution, seduction of a servant, and, in Roman law, theft—are infringements of rights *in rem*, and "breaches of contract," which are, of course, always infringements of such rights *in personam* as arise from agreement. The transfer of remedial rights is still more sparingly allowed than of other rights *in personam*. They may be discharged by release, bankruptcy, set-off, merger, estoppel, or by limitation of actions, by which they are reduced to the level of merely "natural obligations."

Rights have hitherto been considered without any reference to deviations in either the person of inherence or the person of incidence from the ordinary type of a sane, adult, human being. Rights so considered, and the law applicable to them, we have described as *normal*. But rights may also be *abnormal*, i.e. one or both of the persons concerned may deviate from the ordinary type. This is conspicuously the case where a so-called person is "artificial," i.e. a mere creature of law, such as an incorporated company (which, be it observed, is not merely the sum total of its shareholders, but something superadded to them), or, in Roman law, a *hereditas iacens*. It is the case also with "natural" persons, i.e. with human beings whose *status* is affected by infancy, lunacy, alienage, conviction, coverture, *patria potestas*, slavery, and the like. A right, as vested in, or available against, a "normal" person is susceptible of many modifications when either of the persons

with which it is connected are "abnormal." The tendency of modern legal progress is to diminish the number of classes of abnormal natural persons.

*Adjective Private Law, or Procedure*, indicates the mode in which the State will allow a remedial right to be realised. In the exceptional cases in which a sufferer is allowed to redress his own wrong, adjective law points out the limits within which such self-help is permissible. In all other cases it enumerates the steps which must be taken in order duly to make use of the law Courts, for the benefit either of a plaintiff or of a defendant. It accordingly sets forth the rules for (1) determining whether the Courts of a given country will take any cognisance of a given class of questions; (2) selecting the Court which is appropriate for the decision of the matter in dispute; (3) setting in motion the machinery of the Court, so as to obtain its decision; (4) setting in motion the physical force of the State ("execution") by which the judgment of the Court is, in the last resort, to be rendered effectual. These rules, like those of substantive law, are applicable only with certain modifications to "abnormal persons."

#### PUBLIC LAW.

The law which deals with rights in which the State is one of the persons concerned, thus uniting in itself the functions of judge and party, is susceptible of many of the divisions which occur in private law, though they are most conveniently applied in a somewhat different order. The topics of public law may be enumerated as follows:—1. *Constitutional Law*; 2. *Administrative Law*; 3. *Criminal Law*, the general part of which deals with such questions as the nature of a criminal act; the responsibility of the wrong-doer, on the ground of intention or negligence; facts which negative responsibility, such as tender age, compulsion, idiocy or lunacy; facts which justify an act otherwise criminal, such as self-defence, consent of the party injured, lawful authority, or the public welfare; how far omission is equivalent to commission; the persons by whom criminal proceedings may be instituted; the list of punishments; the period of time, if any, which will be a bar to criminal prosecution; the effect of a plea of *autrefois acquit*; the aiding and abetting of crime; criminal attempts; the different grades of crimes; the relation of the prosecution of an offence to a civil action for the injury caused by it to an individual. The special part of criminal law contains a classification of criminal acts (the primary distinction being between those which directly affect the State, and those which, in the first instance, affect the persons or property of private citizens); followed by provisions as to the penal consequences to be attributed to each. 4. *Adjective Criminal Law, or Penal Procedure*. 5. *The Law of the State as a juristic Person*, i.e. as the owner of property; as creditor and debtor; as the employer of servants. 6. *The Adjective Law relative to the State as a juristic Person*, prescribing the procedure to be followed in the cases in which the State may sue or be sued.

#### INTERNATIONAL LAW,

as has been already explained, is a convenient misnomer, to describe that body of principles which has been accepted by general consent among civilised States for the adjustment of their respective rights and duties. These principles, in form and expression, resemble legal rather than moral rules; being, in fact, an imitative application, so far as may be, to the relations of State to State of the rules by which private law defines the

relation of one citizen to another. They are, however, not "law" in any intelligible sense of the term; since they lack any arbiter of disputed questions, save public opinion, beyond and above the disputant parties themselves.

International law, owing to its development having been largely the work of lawyers, and carried out in accordance with legal analysis, is susceptible of most of the distinctions which have occurred in our analysis of "municipal law" (public and private). There is a "substantive" and an "adjective" law of nations. The persons governed by this law may be "normal" or "abnormal," and their quasi-rights may be "antecedent" or "remedial," *in rem* or *in personam*.

These distinctions will be found to give the clue to a distribution of the subject at once simpler and more scientific than that familiarised by the followers of Klüber, or than others usual on the Continent. We have to consider (1) the *Persons* for whose benefit, and as against whom, international rights are recognised; (2) the substantive law which sets forth and explains the *Rights* of those persons; and the adjective law, which explains the procedure by which those rights may be enforced, *i.e.* the law of war: which, as affecting the combatants, is the law of (3) *Belligerency*, as regulating the relations of the States which are engaged with those which are not engaged in the struggle, is the law of (4) *Neutrality*.

(1) The *Persons* of international law are States; which, if members of the "Family of Nations" and in possession of full external sovereignty, are normal; if defective, though not wholly lacking, in such sovereignty, are abnormal ("semi-sovereign").

(2) The *rights* of States, like those of an individual, may be "antecedent" or "remedial." The antecedent rights of a State present many analogies to those of private law. They may be *in rem*, namely, to (i.) safety; (ii.) reputation; (iii.) property; (iv.) jurisdiction; (v.) to protect subjects wheresoever they may be. The antecedent rights of a State *in personam* are nearly all contractual, *i.e.* arise out of "treaty." Remedial rights may entitle the injured State to restitution, to damages, or to an apology, as the case may be.

(3) The law of *Belligerency* defines modes of self-help short of war by which a State may obtain redress for wrong-doing; it discusses the solemnities, if any, to be observed at the commencement of war, and such restrictions as are recognised upon the mode in which it may be carried on.

(4) The law of *Neutrality* explains the extent to which the ordinary rights of a State, especially with reference to the maritime trade of its subjects, are modified by the outbreak of war between its neighbours.

#### THE APPLICATION OF LAW.

When a system of jurisprudence has analysed the rules which prevail between subject and subject, under the ægis of the State to which they belong (private law), between the State and its subjects (public law), and between one State and another State (international law), its task is completed, save for the necessity of removing a misunderstanding.\* The Courts of each State are prepared to decide many cases which have not arisen, or have not wholly arisen, within, or between persons subject to, their own jurisdiction. Hence the necessity in each State for a body of rules indicating (1) which cases of this sort the Courts will, and which cases they will not, allow to be brought before them for decision; also in which cases they will recognise as binding the decision of a foreign Court. This is the

question of *Forum*; (2) the principles in accordance with which the Court, supposing it to entertain the "mixed case" which has been brought before it, is guided in determining whether it will apply to the decision of the case its own law (*lex fori*) or the law of some other, and of which other, country. This is the question of *Lex*. Upon these two topics every civilised country has worked out for itself a set of rules, which form, of course, a portion of the law of that country; and are equally a portion of the national law, whether they are enacted in the articles of a code, or the sections of an Act of Parliament, or must be gathered from the recorded decisions of the law Courts. The resemblance which, from the nature of the case, exists, and tends to increase, between the rules adopted in the various bodies of national laws, with reference to the competent *Forum* and the applicable *Lex*, has given rise to the notion that there exists, as it were *in nubibus*, a body of rules upon the subject, universally binding, and therefore in some sense a branch of international law. Hence the rules in question, whether conceived of as self-existent, or admitted to derive their authority from the political society in which they prevail, have unfortunately come in late years to be described as "Private International Law," rather than by the less misleading, if not wholly adequate, appellation of "the Conflict of Laws."

Jurisprudence, it will have been gathered, is the grammar of law. It is an analysis and synthesis of legal institutions, resulting in a series of categories, which, from the nature of the case, need amplification and illustration from concrete systems to make them readily intelligible. On the other hand, when studied in connection with one or more actual systems of law, jurisprudence gives a mastery of their principles which is hardly otherwise attainable; a mastery analogous to that which an acquaintance with grammatical distinctions gives to the colloquial knowledge of languages. It may, for instance, be doubted whether certain cases would not have been otherwise decided, had the minds of the judges not been too exclusively occupied with the contractual aspect of marriage, to the neglect of its function as creating a *status*.

The first beginnings of a science of jurisprudence must be attributed to the Roman lawyers, to whom, for instance, is due the distribution of the whole field of law under the heads of *personæ res* and *actiones*, the distinctions between the several species of *personæ* and *res* respectively, and in particular the conception of *obligatio*. The chaos of mediæval law was reduced to something like order mainly by the application to it of the ideas of the Roman jurists.

[*Authorities*.—Reference may be usefully made, for example or warning, to the following works, viz.:—The *Pandekten* of Vangerow, Windscheid, or Baron; the *heutiges Römisches Recht* of Savigny; the *juristische Encyclopädie und Methodologie* of Arndts; the *metaphysische Anfangsgründe der Rechtslehre* of Kant; the *Philosophie des Rechts* of Hegel; the *Naturrecht* of Ahrens; the *Leviathan* of Hobbes; the *Delineation of Universal Law* of Fettiplace Bellers, 1750; the *Principles of Morals and Legislation* of Bentham, 1789; the *Province of Jurisprudence determined* of Austin, 1832; and, among more recent treatises, to the *Institutes of Law*, by Professor Lorimer, 1872, 2nd ed., 1880; the *Elements of Law*, by Sir W. Markby, 1871, 5th ed., 1896; and to a *First Book of Jurisprudence*, by Sir F. Pollock, 1896. The writer of the present article has summarised in it the views taken in his work entitled *The Elements of Jurisprudence*, by T. E. Holland, 1880, 8th ed., 1896.]



## Jury.

## TABLE OF CONTENTS.

I. JURY IN CIVIL CASES . . . . .	145	<i>View of locus in quo</i> . . . . .	154
Introductory . . . . .	145	<i>Verdict</i> . . . . .	154
Qualification of, and Exemptions from serving as, Jurors . . . . .	145	III. JURY IN OTHER CASES . . . . .	154
Summoning, Calling . . . . .	147	Coroner's Jury . . . . .	154
Challenging . . . . .	149	County Court . . . . .	154
Swearing in . . . . .	150	Divorce Court . . . . .	154
Special Jury . . . . .	150	Inquisition . . . . .	154
Trial by Jury, in what cases . . . . .	150	Mayor's Court . . . . .	154
View by . . . . .	151	Sheriff's Court . . . . .	154
Withdrawal of a Juror . . . . .	151	IV. GENERAL . . . . .	154
Verdict . . . . .	151	Discharge of . . . . .	154
II. JURY IN CRIMINAL CASES . . . . .	152	Certificate . . . . .	154
The Grand and Petty Jury . . . . .	152	Good Jury . . . . .	154
Special Jury . . . . .	152	Fines, Corruption, and Penalties . . . . .	154
Peremptory Challenge . . . . .	152	Privilege, Remuneration, Refreshments . . . . .	155
Prisoner's Right to see Jury List in certain cases . . . . .	153	Reformation of Jury List . . . . .	155
Swearing in . . . . .	153	Unanimity of . . . . .	155
Giving Prisoner in Charge to the Jury . . . . .	153	V. JUDGE AND JURY . . . . .	156

## I. JURY IN CIVIL CASES.

*Jury*.—A body of men selected and sworn to inquire of certain matters of fact, and to declare the truth upon evidence to be laid before them (Cowell, *Law Dict.*; Cunningham's *Law Dict.*). For History, see Thayer, *Evidence*, "Development of Trial by Jury," 1896; Forsyth, *History of Trial by Jury*; Stubbs, *Constitutional History of England*.

Trials by jury in civil cases were, until the abolition of real actions, of two kinds—extraordinary and ordinary. There were two species of extraordinary trial by jury, that of the grand assize, which, since the abolition of the writ of right, can no longer be summoned, and the jury to try an attain abolished by the Statute 6 Geo. IV. c. 50.

A petty jury consists of twelve men possessing certain qualifications, and constituted in accordance with prescribed practice. The regulations concerning the summoning of juries and the qualification of jurors are mainly contained in the Juries Act, 1825 (6 Geo. IV. c. 50); the Juries Act, 1862 (25 & 26 Vict. c. 107); and the Juries Act, 1870 (33 & 34 Vict. c. 77). Further statutory provisions are made by 1 & 2 Vict. c. 4; 15 & 16 Vict. c. 76 (C. L. P. Act, 1852); 17 & 18 Vict. c. 125 (C. L. P. Act, 1854); 35 & 36 Vict. c. 52; and 60 & 61 Vict. c. 18.

Trial may be either (1) by a common jury, consisting of persons possessing only the ordinary required qualifications in point of property, or (2) by special jury constituted of persons whose names are in the jurors' book for any county or for the county of the city of London, and who possess certain higher social or property qualifications (33 & 34 Vict. c. 77, s. 6).

*Qualification of Jurors*.—Every man, with the exceptions after stated, residing in any county in England or Wales (s. 7, Juries Act, 1870), between twenty-one and sixty years of age, is liable to serve on juries who has within the county in which he resides and in which the action is to be tried in his own name, or in trust for him £10 by the year above reprises (*i.e.* deductions) in lands or tenements of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of such lands or tenements, or in such lands, tenements, and rents taken together in fee-simple, fee-tail, or for the life of himself or some other person; or who has



within the same county £20 by the year above reprises, in lands or tenements held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives; or who being a householder is rated or assessed to the poor-rate or to the inhabited house-duty in Middlesex, on a value of not less than £30, or in any other county on a value of not less than £20 (Juries Act, 1825, s. 1).

These qualifications equally apply to jurors on writs of inquiry (s. 52), but not to the jurors in towns corporate or counties corporate possessing jurisdictions of their own. In such places the jury panels are to be prepared as before accustomed (s. 50).

*Qualification in London.*—A city of London juror must be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce within the city, and have lands, tenements, or personal estate of the value of £100 (s. 50). See Local Government Act, 1888, s. 89.

*Qualification of Special Jurors.*—This is now regulated by sec. 6 of the Juries Act, 1870. Every man whose name is in the jurors' book for any county in England or Wales, or for the county of the city of London, and who is legally entitled to be called an esquire, or is a person of higher degree, or is a banker or merchant, or who occupies a private dwelling-house, rated or assessed to the poor-rate, or to the inhabited house-duty, on a value of not less than £100, in a town of 20,000 inhabitants and upwards; or rated or assessed to the poor-rate, or to the inhabited house-duty, on a value of not less than £50 elsewhere, or who occupies premises other than a farm, rated or assessed as aforesaid, of a value of not less than £100; or a farm rated or assessed as aforesaid on a value of not less than £300, is qualified and liable to serve on special juries in every county in England and Wales and in London respectively.

Women are disqualified for being jurors at common law, except in the case of a *Jury of Matrons*. See MATRONS, JURY OF.

Aliens who have been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, are qualified and liable to serve on juries or inquests in England and Wales, as if they were natural-born subjects, but not otherwise (Juries Act, 1870, s. 8).

*Exemptions.*—Certain persons are excused from serving on juries or inquests, and their names are not inserted in the lists of persons liable to serve. By the Juries Act, 1870, persons thus exempted are: Peers; members of parliament; judges; clergymen; Roman Catholic priests; ministers of any congregation of Protestant dissenters, and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster; serjeants (*q.v.*); barristers-at-law, certificated conveyancers, and special pleaders, if actually practising; members of the Society of Doctors of Law, and advocates of the Civil Law, if actually practising; solicitors, if actually practising, and having taken out their annual certificates, and their managing clerks, and notaries public in actual practice; officers of the Supreme Court, and the clerks of the peace or their deputies, if actually exercising the duties of their respective offices; coroners, gaolers, and keepers of houses of correction, and all subordinate officers of the same; keepers in public lunatic asylums; members and licentiates of the Royal College of Physicians in London, if actually practising as physicians; members of the Royal Colleges of Surgeons in London, Edinburgh, and Dublin, if actually practising as surgeons; apothecaries certificated by the Court of Examiners of the Apothecaries' Company; and all registered medical practitioners, and registered pharmaceutical chemists, if actually practising as

apothecaries, medical practitioners, or pharmaceutical chemists respectively (also registered dentists, "if they so desire"; Dentists Act, 1878, 41 & 42 Vict. c. 33, s. 34). Officers of the navy, army, militia, and yeomanry, while on full pay; the members of the Mersey Docks and Harbour Board; the masters, wardens, and brethren of the corporation of Trinity House of Deptford, Stroud; pilots licensed by the Trinity House of Deptford, Stroud, Kingston-upon-Hull, or Newcastle-upon-Tyne; and all masters of vessels in the buoy and light service employed by either of those corporations; and all pilots licensed under any Act of Parliament or charter for the regulation of pilots; the household servants of her Majesty, her heirs and successors; officers of the post-office; commissioners of customs, and officers, clerks, or other persons acting in the management or collection of the customs; commissioners of inland revenue, and officers or persons appointed by the commissioners of inland revenue, or employed by them, or, under their authority or direction, in any way relating to the duties of inland revenue (also certificated income-tax commissioners, by virtue of 34 & 35 Vict. c. 103, s. 30); sheriffs' officers; officers of the rural and metropolitan police; magistrates of the metropolitan police-courts, their clerk, ushers, doorkeepers, and messengers; members of the council of the municipal corporation of any borough, and every justice of the peace assigned to keep the peace therein; and the town-clerk and treasurer for the time-being of every such borough, so far as relates to any jury summoned to serve in the county where such borough is situate; burgesses of every borough, in and for which a separate court of quarter-sessions shall be holden, so far as relates to any jury summoned for the trial of issues joined in any Court of general or quarter-sessions of the peace in the county wherein such borough is situate; justices of the peace so far as relates to any jury summoned to serve at any sessions of the peace, for the jurisdiction of which he is a justice; officers of the Houses of Lords and Commons.

Members of the London County Council are exempted by a local Act from jury service.

These exemptions apply to persons summoned as jurors to serve on coroners' inquests (*In re Dutton*, [1892] 1 Q. B. 486).

The inhabitants of the city and liberty of Westminster were exempt from serving on any jury at the sessions of the peace for the county of Middlesex (see Juries Act, 1870, s. 9); but this exemption was abolished by the Local Government Act, 1888, s. 89 (2).

The sheriff may excuse noncompliance with the summons if the person summoned can satisfy him of inability, as by sending a medical certificate, or proving absence from the United Kingdom, or permanent change of residence to another county.

*Summoning of Juries—Common Juries.*—A book called the "Jurors' Book" is annually made up in each county, out of lists returned from each parish by the churchwardens and overseers, of persons therein qualified to serve as jurors, in pursuance of annual precepts issued by the clerk of the peace (County Juries Act, 1825, s. 12; Juries Act, 1862, ss. 3, 4; and see Local Government Act, 1888, s. 89). The judges of assize, or, in the case of sittings in London or Middlesex, one of the judges, issue a precept directing the sheriff to summon a sufficient number of jurors for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes or sittings respectively. A printed panel or slip of parchment containing the names of the jurors summoned is made by the sheriff seven days before the commission day or first day of each sittings, and kept in the office for inspection. A printed copy of such panel is delivered by the

sheriff to any party requiring the same on payment of one shilling, and the copy is annexed to the *nisi prius* record (Juries Act, 1825, and 15 & 16 Vict. c. 76, ss. 105-107). All jurors may now be summoned by post (Juries Act, 1862, s. 11).

The jury is called by drawing out, one after another in open Court, of a box into which they have been put, the names of the jurors on the panel annexed to the record, and calling them over in the order in which they are so drawn, and the twelve persons whose names are first called and who appear are sworn as the jury. If any of the men whose names are so drawn do not appear or are challenged (*v. infra*) and set aside, such further number is drawn until twelve men remain, after all just causes of challenge are allowed. After such jury has returned a verdict or been discharged, the same names are returned to the box and kept with the other names remaining undrawn, and so *toties quoties* as long as any issue remains to be tried. Where, however, a jury have not brought in their verdict, and other cases await trial, the Court may order twelve of the residue to be drawn. The same jury may try several issues in succession without being redrawn, if no objection is made on behalf of the Crown or any other party; also where any of the persons drawn have been withdrawn by consent, challenged, or excused, the Court may order their names to be set aside and others to be drawn from the box to try the issue with the residue of the original jury (County Juries Act, 1825, s. 26).

The precept issued by the judges of assize as aforesaid, directs the sheriff to summon a sufficient number of special jurymen to try the special jury causes at the assizes; and a printed panel of the special jurors so summoned is made, kept, delivered, and annexed to the *nisi prius* record in like time and manner, and upon the same terms as in the case of the panel of common jurors. Upon the trial the special jury is balloted for and called in the order in which the names are drawn from the box in the same manner as common jurors (15 & 16 Vict. c. 76, s. 108). Special juries for London and Middlesex are now provided in the same manner as in other counties (Juries Act, 1870, s. 16), although by sec. 17 any of the superior Courts or any judge thereof may, if it seem expedient, order that a special jury be struck according to the former practice, as regulated by sec. 110 of 15 & 16 Vict. c. 76 (Short and Mellor, *Cr. Off. Pr.* p. 212). Special jurors' names are now retained in the jurors' book (Juries Act, 1870, s. 15), and not taken out therefrom as provided by sec. 31 of the County Court Juries Act, 1825.

No person is liable to be summoned to serve on any jury or inquest (except a grand jury) more than once in any one year, unless all the jurors upon the list have been already summoned to serve during the year (Juries Act, 1870, s. 19 (1)). This provision is, however, without prejudice to the operation of certificates (*v. infra*) granted under the 1825 Act, ss. 41, 45. No person is liable to serve as a juror in more than one Court on the same day (subs. 3). No person is exempted from serving as a common juror by reason of his being on any special jurors' list, or being qualified to serve as a grand juror (subs. 2).

By sec. 42 of the 1825 Act, it is provided that no man be returned as a juror to serve at any sessions of *nisi prius* or gaol delivery, in Middlesex, who has served as a juror at either of such sessions in that county, in either of the two terms or vacations next immediately preceding, and has the sheriff's certificate of having so served; and that no man be returned as a juror for any Court of assize who has served at such Court within one year before, in Wales, or in the counties of Hereford, Cambridge,

Huntingdon, or Rutland, or four years before in the county of York, or two years before in any other county and has the sheriff's certificate, and that no man shall be returnable for any grand or petty jury at any sessions of the peace for any county, riding, or division in England or Wales who has served within one year before, in Wales, or in the counties of Hereford, Cambridge, Huntingdon, and Rutland, or two years before in any other county, and has the certificate of the clerk of the peace of having so served.

*Challenge.*—When the jurors have appeared, but before they are sworn, either party has a right of *challenge*, which may be a challenge to the array or a challenge to the polls.

The array is the order or ranking of the jurors on the panel, but the term is more generally used as an equivalent for the full list of jurors, as distinguished from the "polls" or individuals named on the panel.

To challenge the array is at once to challenge or except against all the jurors so arrayed or impanelled in respect of the partiality or default of the sheriff, coroner, or other officer that made the return (*Co. Litt.* 156 *a*). The partiality may arise from official or pecuniary interest or friendship with, or subservience to a party to the proceeding. Challenges "for want of a knight," "for want of hundredors," and for want of aliens, where an alien was to be tried, were abolished by the Juries Act, 1825, ss. 13, 28, and the Naturalisation Act, 1870 (33 & 34 Vict. c. 40, s. 5). Formerly an alien party to proceedings was entitled to a jury *de medietate linguæ*, i.e. a jury the half of which consisted of aliens. In England the common law grounds of challenge to the array are substantially those enacted for Ireland by the Juries Ireland Act, 1876 (39 & 40 Vict. c. 78, s. 17), viz. partiality, fraud, or wilful misconduct of the sheriff or other officers returning the panel. This challenge is equally available in civil or criminal cases.

A challenge to the array, if "principal," i.e. upon one of the grounds mentioned, is absolutely fatal in law to the panel as returned. It may be determined by two triers appointed by the Court, or tried by the Court itself (*Mayor of Carmarthen v. Evans*, 1842, 10 Mee. & W. 274).

A challenge "to the favour" is made where the acts or default of the returning officer only raise a probability of bias or partiality, e.g. that the son of the sheriff has married the daughter of the adverse party (*Co. Litt.* 156 *a*), and is determined either by the Court or by two triers.

A *Challenge to the Polls* is an exception to one or more of the individual jurors, and may also be "principal" or for "favour." The "principal" grounds of challenge are—(1) *Propter honoris respectum*, where a peer is sworn on a jury for the trial of a commoner (*Co. Litt.* 126 *b*; 2 Hawk. c. 43, s. 11).

(2) *Propter defectum*, on account of such objections as alienage, infancy, old age, or want of the requisite qualification.

(3) *Propter affectum*, on the ground of some presumed or actual partiality in the juror, as being of affinity to or in the employment of either party, or interested in the event.

(4) *Propter delictum*, on the ground of infamy, where the juror has been attainted of treason or felony, or convicted of any crime that is infamous, unless he has obtained a free pardon, or is under outlawry (2 Hale, 277; *Bac. Abr.* "Juries" (2); Juries Act, 1870, s. 10).

Challenges to the polls for favour, are such as in the case of the sheriff, would constitute a ground of challenge to favour to the whole panel (*Arch. Cr. Pl.*; *Co. Litt.* 157 *b*; *Bac. Abr.* "Juries" (2) 5).

A challenge to the array must be in writing, specifying the grounds upon which it is based, so that it may be put upon the *nisi prius* record (*R. v. Edmonds*, 1821, 4 Barn. & Ald. 471; *Mayor of Carmarthen v. Evans*, *supra*).

Challenges to the polls are generally made by parol, although in the event of questions being raised as to their validity, they must be entered upon the record. The triers are generally two of the jurymen returned, although the Court can appoint any other two indifferent persons (2 Hale, 275).

*Talesmen.*—If a sufficient number of jurors do not appear, or do not remain after challenges or exemptions, either party may pray a *tales*, i.e. a supply of such men as are summoned upon the panel to make up the deficiency. The judge trying the cause can, at the request of either party, award a *tales de circumstantibus*. The sheriff then, in obedience to the command of the Court, returns so many other men duly qualified as are present or can be found to make up the number required for constituting a full jury. In special jury causes, the deficiency is made up from the special jury panel, if a sufficient number can be found. If such number cannot be found, then the Court will award a *tales de circumstantibus* as just described (Juries Act, 1825, s. 37).

*Swearing in.*—When a jury of twelve has been obtained, the jurors are sworn to try the case before them. A juror is usually sworn holding the New Testament in his right hand, kissing the book when he has taken the oath. A Jew is sworn on the Old Testament, and professors of any creed can be sworn in any manner they consider binding (1 & 2 Vict. c. 105). Under the provisions of the Oaths Act, 1888, any person who so desires may be sworn in the Scotch form, with uplifted hand and without kissing the book. A juror may object to take an oath, and claim to affirm on such grounds as that he has no religious belief, or that the taking of an oath is contrary to his religious belief.

*Special Jury, how Obtained.*—The plaintiff, in any cause or matter in which he is entitled to have a jury, may have the issues tried by a special jury upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial (Order 36, r. 7 (b)); and the defendant, where entitled to a jury, may have the issues tried by a special jury on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues, and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given (Order 36, r. 7 (c)). A judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just (Order 36, r. 7 (d)).

*Costs of.*—The party who applies for a special jury has to bear the costs thereof, and upon taxation no allowance is made other than the party would be entitled to had the causes been tried by a common jury, unless the judge before whom the cause is tried, immediately after the verdict, certifies that it was a proper cause to be tried by a special jury (Juries Act, 1825, s. 34). The application for a certificate must be made while the matter is fresh in the mind of the judge who tried it (*Webster v. Appleton*, 1890, 62 L. T. 704). There cannot be a certificate under the above section without a trial, as where the record has been withdrawn (*Clements v. George*, 1826, 11 Mo. 510; see also *Christie v. Richardson*, 1842, 10 Mee. & W. 688; *Waggett v. Shaw*, 1812, 3 Camp. 316; *Grace v. Clinch*, 1843, L. R. 4 Q. B. 606; *Geeves v. Gorton*, 1846, 15 Mee. & W. 186).

Where notice has been given to try by a special jury, but if notice has not been given to the sheriff that such cause is to be so tried, it may be tried by a jury from the panel of common jurors (15 & 16 Vict. c. 76, ss. 112, 113).

*Trial by.*—The cases in which actions are tried before a jury are now

fixed by the Rules of the Supreme Court. These rules, which constitute a code and must be read together, are as follow:—

In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff may, in his notice of trial—and the defendant may, upon giving notice within four days from the time of the service of notice of trial, or within such extended time as the Court or a judge may allow, or in a notice of trial given by him—signify his desire to have the issues of fact tried by a judge with a jury (Order 36, r. 2).

Causes or matters assigned to the Chancery Division (J. A., 1873, s. 34) are tried by a judge without a jury (r. 3).

The Court or a judge may, if it appears desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter, which previously to the passing of the Judicature Act, 1877, could without any consent of parties have been tried without a jury (r. 4).

The Court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in their or his opinion, conveniently be made with a jury (r. 5).

In any other cause or matter, upon the application within ten days after notice of trial has been given of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury (r. 6).

The effect of these rules is considered in *The Temple Bar*, 1885, 11 P. D. 6; *Coote v. Ingram*, 1887, 35 Ch. D. 117; *Timson v. Wilson*, 1888, 38 Ch. D. 72; *Jenkins v. Bushby*, [1891] 1 Ch. 490.

In all actions in the High Court, except those in which either party has a right to a trial by jury and has insisted on such right, the mode of trial is by a judge without a jury. The Court or a judge may, however, at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors (Order 36, r. 7 (a); *Jenkins v. Bushby*, *supra*).

*View by.*—The Court or a judge, upon the application of any party to a cause or matter, may order the inspection by a jury of any property or thing being the subject of such cause or matter, or as to which any question may arise therein, and may make such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury for the purpose (R. S. C., Order 50, rr. 3, 5). Where the venue was in Lancashire, and it was sought to obtain an order directing the sheriff of Lancashire to bring a Lancashire jury to view land in Cheshire, the application was refused (*Stoke v. Robinson*, 1889, 6 T. L. R. 31).

*Withdrawal of a Juror.*—Sometimes at the suggestion of the judge, or if neither party cares for the case to proceed, a juror may be withdrawn, with the result that the action is at an end, and no fresh action can be brought. So if a juror be withdrawn by consent, and the action be afterwards proceeded with or a fresh action brought, the defendant may apply to stay proceedings (*Gibbs v. Ralph*, 1845, 15 L. J. (Ex.) 7). Such a withdrawal, however, if upon terms, does not necessarily put an end to the action (*Thomas v. Exeter, etc., Co.*, 1887, 18 Q. B. D. 822). At common law, counsel had a general authority to withdraw a juror (*Strauss v. Francis*, 1866, L. R. 1 Q. B. 379).

*Verdict.*—See VERDICT.

## II. JURY IN CRIMINAL CASES.

In criminal cases the law places the twofold barrier of a *presentment* and a *trial* by jury between the liberties of the people and the prerogative of the Crown (Jacob).

Every accusation for treason or felony is preferred to and, if found true, presented to the Court upon oath by a *grand jury*, whereafter the actual trial takes place before the *petty jury* (see INDICTMENT and PRESENTMENT). In the case of misdemeanours the Crown can proceed by information instead of by indictment (see INFORMATION).

Strictly speaking, an indictment is not so called until it has been found a "true bill" by the grand jury; before that it is merely a "bill." The bill must be found by a majority, which must consist of twelve at least; for this reason the number of persons on the grand jury cannot exceed twenty-three, nor be less than twelve (2 Hale, 16; 2 Burr. 1088; *R. v. Marsh*, 1837, 6 Ad. & E. 241; Arch. Cr. Pl. 87).

Grand jurors of sessions of the peace must be qualified according to 6 Geo. IV. c. 50, s. 1; grand jurors at the assizes or at borough sessions require no qualification by estate; grand jurors need not be freeholders. The grand jury hears some of the evidence intended to be called at the trial in support of the accusation. Witnesses examined before grand juries are now sworn in the presence of the jurors, and it is no longer necessary for the witnesses so to be examined to be sworn in open Court (19 & 20 Vict. c. 54, ss. 1, 2).

By 35 & 36 Vict. c. 52 a grand jury in Middlesex need not be summoned in any term unless the Master of the Crown Office has, before the fourth day of the term, received notice of some business intended to be brought before them.

*The Petty Jury.*—What has been stated above to be the law in regard to juries in civil cases is generally applicable to the jury which tries the case in a criminal proceeding.

*Special Jury.*—In important indictments or informations for misdemeanour, when the record is in the Queen's Bench Division, a special jury can be obtained on the motion of either prosecutor or defendant (Arch. Cr. Pl., 21st ed., 169). The procedure for obtaining a special jury is now regulated by Crown Office Rules, 1886, r. 158 (see Short and Mellor, Cr. Off. Pr. 212). By virtue of sec. 30 of the County Juries Act, 1825, the Court of Queen's Bench, upon motion made on behalf of the Crown or upon the motion of any prosecutor, relator, plaintiff, or demandant, or of any defendant or tenant in any case whatever, whether civil or criminal, or on any penal statute, *excepting only indictments for treason or felony*, can order a special jury to be struck. A special jury cannot be obtained in misdemeanours tried on the Crown side of a Court of assize or at sessions. A judge who tries a criminal proceeding may certify for costs of special jury under sec. 34 of the 1825 Act (*R. v. Pembroke*, 1842, L. R. 3 Q. B. 901). The statutory provisions set out above in regard to special juries in civil cases are also generally applicable to special juries in criminal cases. •

*Peremptory Challenge.*—Besides a similar right of challenge for cause shown, as before described in regard to civil matters, the defendant in certain cases has a right to challenge peremptorily individual jurymen without any reason assigned; such challenge the Court is bound to allow. Thirty-five peremptory challenges are allowed in the case of treason (7 & 8 Will. III. c. 3, s. 2), except in the case of an attempt to injure the person

of the Queen, where the number is twenty. 7 & 8 Will. III. c. 3, s. 2, fixes the challenges for misprision of treason at thirty-five. The treasons triable as murder are those specified in 39 & 40 Geo. III. c. 93; 5 & 6 Vict. c. 51, s. 1, i.e. where the overt act alleged is assassination of the sovereign or a direct attempt against his life or against his person, whereby his life may be endangered or bodily harm caused, or attempts to injure in any manner the person of the sovereign. The challenge in misprision of treason is clearly provided for both in 7 & 8 Will. III. c. 3, s. 2, and in the cases of treason triable as murder, like provision is made as to misprision (39 & 40 Geo. III. c. 93; 5 & 6 Vict. c. 51, s. 1). Twenty is also the number in murder and all other felonies (County Juries Act, 1825, s. 29; 2 Hale, 268). It was formerly doubtful which number is to be allowed in misprision of treason (Arch. Cr. Pl. 171; 2 Hawk. c. 43, s. 5). The right of peremptory challenge does not extend to misdemeanours (*Co. Litt.* 156).

The Crown has no unlimited right of challenge, but can order jurors to stand aside without reason assigned till the panel is exhausted. When this has happened, the Crown must show cause for each challenge (Huband, p. 633; 6 Geo. IV. c. 50, s. 29; see *Mansell v. R.* (in error), 1857, 8 El. & Bl. 54). Besides the challenges for cause allowed in civil proceedings, in a criminal case a member of the grand jury which returned the bill, or of the coroner's jury which made the inquisition, can be challenged for cause, if put on the petty jury (25 Edw. III. st. 5, c. 3; Y. B. 14 & 15 Edw. III., ed. Pike, p. xxvi).

Until 1897 juries, when once sworn and charged with the accused on an indictment for treason, misprision of treason, or felony, were not allowed to separate until they returned a verdict, or were discharged for failure to agree, or other lawful cause. In misdemeanours and civil cases they were permitted to separate and return to their homes at the end of each day's proceedings. Under the Juries Detention Act, 1897 (60 & 61 Vict. c. 18), the Court may allow a jury in a criminal case to separate if the charge is one of "a felony other than murder, treason, or treason felony."

In any indictment for treason, felony, or piracy every peremptory challenge beyond the legal number is void, and the trial proceeds as if no such challenge had been made (7 & 8 Geo. IV. c. 28, s. 3).

*Indictments for High Treason or Misprision of Treason.*—When any person is indicted in any Court other than the Court of Queen's Bench, a list of the petty jury must be given along with the copy of the indictment to the party ten days before the arraignment; and if in the Court of Queen's Bench, while a copy of the indictment is delivered as above, the list of the petty jury may be delivered to the party indicted at any time after the arraignment, so as to be delivered ten days before the day of trial. This privilege does not extend to persons accused of direct attempts against the king's person (39 & 40 Geo. III. c. 93; 5 & 6 Vict. c. 51, s. 1), or to counterfeiting His Majesty's coin, the Great or Privy Seal (Juries Act, 1825, s. 21). Counterfeiting coin and forgery of seals are now treated as felonies.

*Swearing in.*—In cases of treason and felony each juror is sworn separately; in misdemeanours they are sworn in batches of four. The same right to make an affirmation in lieu of oath exists as in civil proceedings (see 1 & 2 Vict. c. 10, s. 5; 51 & 52 Vict. c. 46, ss. 3, 5).

*Giving the Prisoner in Charge to the Jury.*—The prisoner is, by the form of the oath administered to the jury in cases of treason and felony, given into their charge. But misdemeanants are not so given in charge to the jury. See as to this, sec. 116 of the Larceny Act (24 & 25 Vict. c. 96), and sec. 37 of the Coinage Offences Act (24 & 25 Vict. c. 991); Arch. Cr. Pl. p. 178.



*View of locus in quo.*—The judge may allow the jury to view the *locus in quo* at any time during the trial, even after his summing up, but he must take precautions not to allow improper communications to be made to them at the view; and should the jury at the view receive evidence in the absence of the judge and the prisoner, the Court before which the trial takes place must ascertain whether such alleged irregularity has occurred (*R. v. Martin*, 1872, L. R. 378 C. C.). As to effect of such irregularity, see *ibid.* and Arch. Cr. Pl., 21st ed., p. 215.

*Verdict, General, Special, Defect cured by, Verdict on Special Pleas.*—See VERDICT, where the effect of an award of jury process to a wrong officer on an insufficient suggestion is also considered.

### III. JURY IN OTHER CASES.

*Coroner's Jury.*—See CORONER.

*County Court Jury.*—See COUNTY COURTS.

*Divorce Court.*—The Court will on the application of either party direct that the questions of fact be tried by a jury; and where the petition contains a claim for damages, the cause must be tried by a jury (*Mat. Causes Act*, 1857, s. 33).

*Inquisition.*—See LUNACY.

*Mayor's Court Jury.*—See LONDON (CITY).

*Sheriff's Court Jury.*—See SHERIFF COURT and LANDS CLAUSES ACTS, and *Good Jury*, *infra*.

### IV. GENERAL.

*Discharge of.*—In ordinary course the jury is discharged on the termination of the trial by verdict or sentence. But the judge may discharge a jury in his discretion for various reasons, such as the illness of the prisoner, or the illness or death of a juror; or if he is of opinion that they are so exhausted as to be incapable of continuing their deliberations, or so divided as to be unable to agree. In these cases, however, a second trial may be had (*Winsor v. The Queen*, 1866, L. R. 1 Q. B. 289, 390; and see *The Queen v. Charlesworth*, 1861, 1 B. & S. 460).

*Certificate.*—Jurors who have duly served on trials before any Court of assize are entitled to receive from the sheriff, upon application and payment of one shilling, a certificate testifying such service. This provision does not extend to grand jurors or special jurors (s. 40, 1825 Act).

Grand or petty jurors who have duly served at sessions of the peace are similarly entitled to a certificate from the clerk of the peace (s. 41).

*A Good Jury.*—A jury obtained by a judge's order for the purposes of a writ of inquiry. In London since the passing of the Juries Act of 1825, the sheriffs on receiving an order for a good jury have treated it as an order for a special jury. In Middlesex the practice has been for the undersheriff to give the party who obtained the order the option of having the jury selected from the special jury list, or from among a superior class of tradesmen on the common jury; but see *Vickery v. London, Brighton, etc., Ry. Co.*, 1870, L. R. 5 C. P. 165; *Vines v. London, Brighton, etc., Ry. Co.*, 1870, L. R. 5 Ex. 201.

*Fines.*—A juror is liable to a fine for failing to attend if duly summoned, or if he does not answer to his name after being thrice called, or after having been called is present but does not appear, or after appearance wilfully withdraws himself from the presence of the Court; unless some reasonable excuse is proved by oath or affidavit (s. 38, 1825 Act). A juror summoned for a view who makes default is liable to a minimum fine of £10

(s. 38). **Fines** may be remitted upon cause shown (Juries Act, 1862, s. 12). But no juror is liable to any penalty for non-attendance unless he receives at least six days' notice (s. 21, 1870 Act). Corrupt jurors may be proceeded against by indictment or information, and punished by fine and imprisonment (s. 61, 1825 Act).

**Penalties.**—The Acts provide for the imposition of penalties in the following cases:—

Where the sheriff or other minister wilfully impanels and returns a man as a juror whose name does not appear in the jurors' book, or if an officer of Court wilfully records the appearance of any juror so returned who did not really appear (1825 Act, s. 39).

Where churchwardens and overseers neglect to make out lists (s. 45), and where clerks of the peace neglect the duties imposed upon them by the Acts (s. 46).

If an overseer without reasonable excuse improperly inserts in or omits from the jury list any name (1870 Act, s. 13).

The sheriff or other minister may be fined for returning any person as a juror during his certified period of exemption from service (s. 42), and also for taking money to excuse persons from serving (s. 43). A bailiff inserting names not in the sheriff's warrant may be fined.

**Privilege.**—Any observation made by one of the jury during the trial is privileged, provided it is pertinent to the inquiry (*R. v. Skinner*, 12 Geo. III. 55 Lofft; *Odgers on Libel and Slander*, p. 213).

**Remuneration.**—A special juror is only allowed for his services such sum, not exceeding one guinea, as the judge who tries the case thinks just and reasonable, except in cases where a view has been directed and been taken by the particular juror (Act of 1825, s. 35). A special juror gets one guinea for each case whether tried out or not, and however long it lasts. A special juror is entitled to another guinea per day if sworn in to take a view. A common juror is entitled to five shillings a day for a view (*R. G. H. T.* 1853, r. 49), but otherwise he is at law not entitled to any payment. It is usual, however, in the High Court to give a fee of one shilling, and in the counties eightpence. No fee is allowed in a criminal case. The fee in the County Court is one shilling per case (51 & 52 Vict. c. 43, s. 101), in the Mayor's Court twopence, and in the London Sheriff's Court fourpence (*Holland, Jurymen's Handbook*).

**Refreshments.**—Jurors after having been sworn may in the discretion of the judge be allowed at any time before giving their verdict the use of a fire when out of Court, and may be also allowed reasonable refreshment, to be procured at their own expense (Juries Act, 1870, s. 23).

**Reformation of Jury Lists.**—The justices of the peace in every division in England and Wales hold a special petty sessions within the last seven days of September in every year to reform the jury list. The justices are empowered to strike out the names of those not qualified or liable to serve, and to erase names for lunacy, deafness, blindness, or other permanent infirmity of body. They can also insert names omitted, and reform generally any errors or omissions, provided that they do not do so without notice to the parties, unless the reform has been made on the party's own application (Juries Act, 1825, s. 10).

**Unanimity of.**—The jury must be unanimous, otherwise the proceedings are abortive. In civil cases, however, it is not uncommon for the parties to consent to accept the verdict of a majority of the jury.

## V. JUDGE AND JURY.

The respective functions of the judge and the jury at a trial are generally described in the maxim *ad questionem juris respondent judices, ad questionem facti respondent juratores* (see *R. v. Dean of St. Asaph*, 1783, 21 How. St. Tr. 1033), although its application, so far as the jury is concerned, must be to some extent limited. "It relates to *issues* of fact, and not to the incidental questions that spring up before the parties are at issue, and before the trial, nor even to many which present themselves during the trial" (Thayer, *Cases on Evidence*, p. 144). All questions of mere fact, however, arising at the trial are for the jury (see *Stewart v. Merchants Mar. Insur. Co.*, 1886, 16 Q. B. D. 619, 627). Where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. In all cases where an objection is made to the competency of witnesses, any evidence to show this incompetency must be received by the judge, and adjudicated on by him alone (*Bartlett v. Smith*, 1843, 11 Mee. & W. 483).

It is for the judge to decide whether there is evidence which ought to be left to the jury. The rule upon this subject was stated as follows by the Court of Exchequer Chamber in *Ryder v. Wombwell*, 1868, L. R. 4 Ex. 32, where the question was whether articles supplied by the plaintiff to the defendant were "necessaries": "The first question is whether there was any evidence to go to the jury that either of the articles was of that description? Such a question is one of mixed law and fact; in so far as it is a question of fact, it must be determined by a jury, subject, no doubt, to the control of the Court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant" (and see *Bridges v. North London Ry. Co.*, 1874, L. R. 7 H. L. 213).

As a general rule, subject, however, to exceptions, questions of "actual knowledge," "*bona fides*," "due diligence," "express malice," "negligence," "real intention," "reasonable cause," "reasonable skill and care," are to be determined by the jury (see Taylor on *Evidence*, 9th ed., vol. i. pp. 38-40, and cases therein cited). Questions of "discretion" or of "good cause," in the matter of costs, are for the judge (County Courts Act, 1888 (51 & 52 Vict. c. 43), R. S. C. Order 65, r. 1).

"The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred. The jurors have to say whether from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance that the separate functions should be maintained, and maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever" (per Lord Cairns, *L. C. Metrop. Ry. Co. v. Jackson*, 1877, 3 App. Cas. 193).

"Probable cause" is a question for the judge alone, although it is for the jury to find the truth or not of the facts relied upon for supporting the presence or absence of probability (*Sutton v. Johnstone*, 1787, 1 T. R. 493; *Panton v. Williams*, 1841, 2 Q. B. 169; *Abrath v. N.-E. Rwy. Co.*, 1886, 11 App. Cas. 247).

In *Lister v. Perryman*, 1870, L. R. 4 H. L. 521, the Lords expressed regret that the law was as stated, because "the existence of reasonable and probable cause is an inference of fact, and must be derived from all the circumstances of the case" (per Lord Westbury).

The question of "reasonable time" is one sometimes for the Court, sometimes for the jury (see Taylor on *Evidence*, 9th ed., vol. i. pp. 31-38).

*Written Documents.*—Questions as to their construction are for the Court, after the true meaning of the words and any surrounding circumstances have been found by the jury (*Tamvaco v. Lucas*, 1862, 30 L. J. Q. B. 234; 31 L. J. Q. B. 296; *Lyle v. Richards*, 1866, L. R. 1 H. L. 222; *Alexander v. Vanderzee*, 1872, L. R. 7 C. P. 530; *Ashforth v. Redford*, 1873, L. R. 9 C. P. 20).

As to the function of the jury in proceedings for libel, see FOX'S LIBEL ACT; DEFAMATION; in proceedings under the Dramatic Copyright Act, 1833, see COPYRIGHT; on indictments for writing threatening letters, and for perjury, see MENACES; PERJURY.

*Foreign Laws.*—Foreign laws, usages, and customs cannot be judicially noticed, but must be found as facts by the jury in each particular case (*Mostyn v. Fabrigas*, 1774, 1 Cowp. 161; *Sussex Peerage case*, 1844, 11 Cl. & Fin. 85; *Brenan's case*, 1847, 10 Q. B. 492; *Prouse v. European and Am. S.S. Co.*, 1860, 13 Moo. P. C. 484). And so although a point of foreign law may have been proved and acted upon in one Court, another Court will not rely upon the report of such a case, but will require fresh proof of the law, as a matter of fact, on each particular occasion (*McCormick v. Garnett*, 1854, 23 L. J. Ch. 717).

[*Authorities.*—Bacon, *Abr. "Juries"*; Hale; Coke; Hawk.; Blackstone's *Com.*; Stephen's *Com.*; Arch. *Cr. Pl.*; Taylor on *Evidence*, part i. ch. iii.; Thayer, *Cases on Evidence* and *Evidence at the Common Law*; Stubbs, *Constitutional History*; Forsyth, *History of Trial by Jury*; Holland, *Juryman's Handbook*; Pollock and Maitland, *History of English Law*; Huband, *Law of Juries*; Short and Mellor, *Crown Office Practice*.]

**Jury of Matrons.**—See MATRONS, JURY OF.

**Jus gentium**, of which the term "Law of Nations" and "Droit des gens" are translations, is a term in Roman law.

The *jus gentium*, when opposed to the *jus civile*, means the institutions of Roman law, admitted by all civilised peoples of antiquity; *jus gentium est, quo gentes humanæ utuntur*. The *jus civile* designated the institutions of Roman law which were not universally admitted; *jus civile est, quod populus romanus ipse sibi constituit*. The *jus gentium* was not international law, nor was it, so to speak, philosophical or ideal law, which is a product of ethical reasoning, though the two notions were often confounded; for the rules of law in question were founded on reason, and were therefore also called *jus naturale* or *jus natura*.

Sir H. Maine says—

The *jus naturale*, or law of nature, is simply the *jus gentium* or law of nations seen in the light of a peculiar theory. An unfortunate attempt to discriminate them

was made by the Jurisconsult Ulpian, with the propensity to distinguish characteristic of a lawyer; but the language of Gaius, a much higher authority, and the passage quoted before the Institutes, leave no room for doubt that the expressions were practically convertible. The difference between them was entirely historical, and no distinction in essence could ever be established between them (*Ancient Law*, p. 52).

The confusion between *jus gentium* and international law is entirely modern. The classical expression for international law, adds Maine, is *jus feciale*, or the law of negotiation and diplomacy (see also Wildman, *Institutes of International Law*); but this is too restrictive, and though indistinct impressions as to the meaning of *jus gentium* have had a considerable share in producing the modern theory that the relations of independent States are governed by the law of nature, it is nevertheless certain that so far as Rome possessed an international law, properly so called, it was the *jus gentium* (*Ancient Law*, by H. S. Maine, 4th ed., London, 1870, pp. 52, 53).

This subject will be found admirably discussed in an article on Maine and his work in the *Edinburgh Review* of July 1893, in which it is stated that it seems clear that *jus gentium* was not opposed to the law of nations (in the sense of a legal or quasi-legal rule binding on independent States in their mutual relations), but included that law so far as it existed apart from the technical *jus feciale*. The late Mr. H. Nettleship has shown in the *Journal of Philology*, xiii. 169, that such was the actual use of the term, and it was quite logical. It is agreed that *jus gentium* meant that which was regarded as binding or usual by everybody; not by foreigners as distinguished from Romans, but by Romans in common with foreigners. "Why," asks the writer in the *Edinburgh Review*, "should this exclude such rules of conduct, as between sovereign States or independent tribes, as were in fact commonly admitted? Any limitation of *jus gentium* to the conduct of individual citizens would have involved a far more curious and particular analysis of terms (we need not stop to inquire whether a more correct one) than ever occurred to a Roman lawyer." It is probable, he argues, that the adoption of *jus gentium* into Roman law was an assimilation of custom rather than a systematic imposition of rules from above; in other words, that it was much more like the recognition of the law merchant by the common law than the development of the rules of equity. Customs of trade must have existed among the merchants of divers Italian and Græco-Italian cities who resorted to Rome, and it seems a natural supposition that the *jus gentium* administered by Roman tribunals was in its historical origin a law merchant, as in England (see *LEX MERCATORIA*) where the law merchant was in the later mediæval period sometimes expressly treated as equivalent to the law of nature.

[*Authorities*.—Maine, *Ancient Law*, 4th ed., Lond. 1870; Van Wetter, *Cours de droit romain*, Paris, 1875; Wildman, *Institutes of International Law*, Lond. 1849; *Edinburgh Review*, July 1893, article on Sir H. Maine.]

**Jus patronatus** in the Latin canon law signifies the right of presentation or appointment to an ecclesiastical foundation, the person in whom the right is vested being regarded as the *patronus* or *advocatus*, in other words, the protector of the Church (see further as to the historical origin of the right, article *ADVOWSON*; see also article *PATRON*; and for the general account of the right, see Van Espen, *Jus Eccl. Universum*, Pars. 11, s. 111, tit. viii. *De jure patronatus*).

**Jus representationis**—The right of representation. For example, the descendants of children who may have died in the lifetime of an intestate stand in the place of, or represent, their parent or ancestor. Again, executors, administrators, and trustees represent their testator, settlor, or intestate.

**Just Allowances.**—By Order 33, r. 8, of the Rules of the Supreme Court, 1883 (which is taken from Order 23, r. 16, of the Chancery Consolidated Orders), it is provided that in taking any account directed by any judgment or order, all just allowances shall be made without any direction for that purpose. The above rule of practice, importing "just allowances" into every order directing accounts, was first introduced in 1859. Before that time decrees expressly directed that in taking accounts all just allowances should be made.

It is not the ordinary course of the Court to say in the first instance what is a just allowance (*Brown v. De Tastet*, 1821, Jac. 284; 23 R. R. 59).

It would obviously be impossible within the limits of this article to discuss the numerous instances in which the aid of the rule can be invoked. Some of the cases on the subject, however, can be usefully referred to.

*Executors and Trustees.*—It is a clear rule of the Court that it will not allow an executor or trustee for his time and trouble, especially where the testator has left him an express legacy for his pains (*Robinson v. Pett*, 1734, 3 P. Wms. 249). And on the same principle, an executor or trustee will not be allowed to make professional charges against the trust estate. Thus in the case of an agent (*Sheriff v. Axe*, 1827, 4 Russ. 33), of a factor (*Scattergood v. Harrison*, 1729, Mos. 128), of a solicitor (*Moore v. Frowd*, 1837, 3 Myl. & Cr. 45), unless the instrument creating the trust gives power to make such charges (*In re Sherwood*, 1840, 3 Beav. 338); and even in that case a solicitor-executor will not be allowed to charge for work for which, as executor, he ought not to employ a solicitor (*Harbin v. Darby*, 1860, 28 Beav. 325). But inasmuch as the Court enforces strictly the principle that a trustee shall not make any profit from his office, the principle that, while he acts in the due discharge of his duty, he is to be indemnified against all loss ought to be enforced with equal strictness. And, accordingly, all sums honestly and properly expended by a trustee in the execution of his trust will be allowed him as against the trust estate (*Walters v. Woodbridge*, 1878, 7 Ch. D. 504).

Thus, where an action is brought against a trustee in respect of the trust estate, and is defended by the trustee, not for his own benefit, but for the benefit of the estate, he is entitled to indemnity (*Walters v. Woodbridge*, *ubi supra*). And so, a trustee was allowed sums paid by him for damages and costs in an action of tort brought in consequence of an accident which occurred in the execution of orders given by the trustee in discharge of his duty (*Benett v. Wyndham*, 1862, 4 De G., F. & J. 259). There may be many cases in which, though executors or trustees fail in their defence of a suit brought against them, it may be right to allow them their costs out of the estate (*Graham v. Wickham*, 1865, 2 De G. & F. 497; and see *In re Harrison*, *Fulton v. Andrew*, 1876, 24 W. R. 979).

Where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses under the head of "just allowances." And similarly with regard to the next friend of an infant. For

as the infant himself cannot incur charges and expenses, if they cannot be claimed under "just allowances," and the next friend is to be at the whole expense of the infant beyond his costs of suit, persons would hesitate to accept the office (*Fearn v. Young*, 1804, 10 Ves. 184).

Where persons interested in the administration of a fund have incurred legitimate and proper expenses in performing duties thrown on them by their fiduciary situation, they have a right, both at law and in equity, to reimburse themselves out of the funds in their hands without special power to that effect (*A.-G. v. Mayor of Norwich*, 1837, 2 Myl. & Cr. 406).

Where an executor employed a solicitor to negotiate for compromise of a debt, and the solicitor represented that the compromise had been duly effected, and obtained from the executor, and misappropriated the sum required for the purpose of such compromise, the amount was allowed (*In re Bird, Oriental Commercial Bank v. Savin*, 1873, L. R. 16 Eq. 203).

Payments made by an executor in discharge of legacies are "just allowances" (*Nightingale v. Lawson*, 1784, 1 Cox, 23; and see *Lloyd v. Lloyd*, 1873, 23 W. R. 787).

The expenses of a sale have been ordered to be taxed under the head of "just allowances" (*Crump v. Baker*, 1810, 18 Ves. 284).

Where trustees, without authority, but *bond fide* and acting under advice, laid out sums of money as a means of facilitating the sale and increasing the value of land forming part of the trust estate, it was held that, at the outside, all that could be disallowed would be the amount of loss occasioned by the expenditure (*Vyse v. Foster*, 1872, L. R. 8 Ch. 309; 1874, L. R. 7 H. L. 318).

A widow, who was trustee for her son of certain real estate, was allowed under the head of "just allowances" to retain out of the rents and profits the amount of her dower (*Graham v. Graham*, 1749, 1 Ves. Sen. 262).

If a trustee is sued for an account, and if it shall appear that he has properly expended sums of money for the maintenance and support of his *cestui-que trust* at a time when such *cestui-que trust* was himself incapable of taking care of himself, the Court will allow the trustee credit for such sums of money (*Nelson v. Duncombe*, 1846, 9 Beav. 211).

Even where a trustee has been guilty of an illegal act, the account against him will be taken with "just allowances." Thus, where the sale of a testator's business to one of the executors was set aside, and an account of profits made since the sale was directed, it was held that he was entitled to "just allowances," though not to salary (*In re Norrington, Brindley v. Partridge*, 1879, 13 Ch. D. 654).

**Mortgagor and Mortgagee.**—In taking accounts of a mortgagee under a judgment, "just allowances" cover all payments to which the mortgagee is entitled under the terms of his security (*Tipton Green Colliery Co. v. Tipton Moat Colliery Co.*, 1877, 7 Ch. D. p. 194).

Under the head of "just allowances," in a redemption action against a mortgagee in possession, the mortgagee is entitled to necessary repairs, but to entitle him to permanent improvements or substantial repairs, he must make out a case for them at the trial (*Tipton Green Colliery Co. v. Tipton Moat Colliery Co.*, 1877, 7 Ch. D. 192). If the mortgagee, at the hearing, having charged in his pleadings that he has laid out money in lasting improvements, produces general evidence that he has so laid out money,—that is, produces evidence of the laying-out of the money, and that the works are *prima facie* improvements,—that is sufficient for an inquiry. If he proves more,—that is, if he not only proves that he has laid out money in permanent works, but that they are really improvements and have improved

the property to the extent of the money laid out,—he will then get not only an inquiry but an account of the sums laid out in lasting improvements (per Jessel, M. R., *Shepard v. Jones*, 1882, 21 Ch. D. p. 476; and see *Sandon v. Hooper*, 1843, 6 Beav. 246; *Henderson v. Astwood*, [1894] App. Cas. 150).

As to what allowances are made to a mortgagee in possession, see, per Jessel, M. R., *Union Bank v. Ingram*, 1880, 16 Ch. D. p. 56.

In a redemption action against the mortgagees of a ship they were held entitled under the head of "just allowances" to be allowed expenses incurred by them in taking and holding possession of the ship, advertising it for sale, and effecting insurances (*Wilkes v. Saunion*, 1877, 7 Ch. D. 188). And under the term "just allowances" the costs of an action relating to the mortgaged property were allowed (*Blackford v. Davis*, 1869, L. R. 4 Ch. 304). But ordinarily, where extra costs or expenses are claimed by a mortgagee beyond costs of suit, there must be an inquiry in the judgment to ascertain the amount of such costs, charges, and expenses (*Rees v. Metropolitan Board of Works*, 1880, 14 Ch. D. 372; *Bolingbroke v. Hinde*, 1884, 25 Ch. D. 795). Under such an inquiry the mortgagee is entitled to "all just allowances" (*Rees v. Metropolitan Board of Work*, *ubi supra*).

*Partners.*—Surviving partners, where not executors of a deceased partner, are entitled to an allowance for their time and trouble in carrying on the business in which the capital of the deceased partner is employed, and in taking partnership accounts such a claim would be recognised as a just allowance (*Brown v. De Tastet*, 1821, Jac. 284; 23 R. R. 59; *Cook v. Collingridge*, 1822, Jac. 607; 23 R. R. 155; *Featherstonhaugh v. Turner*, 1859, 25 Beav. 392).

*Principal and Agent.*—In a suit against a solicitor who had acted as steward and land agent for the plaintiff, under a decree directing an account with just allowances of rents, profits, and timber money received by the defendant on account of the plaintiff, he was not allowed to set off against the sum due from him the amount of certain bills of costs due to him as a solicitor from the plaintiff (*Jolliffe v. Hector*, 1841, 12 Sim. 398; and see *Waters v. Earl of Shaftesbury*, 1866, L. R. 2 Ch. 231).

*Trespass to Coal Mines.*—In cases of trespass for illegally working coal, where the defendant has acted inadvertently, or under a *bond fide* belief of title, or fairly and honestly, or through mere mistake, the expenses of severing or getting will be allowed; but where the conduct of the defendant has been fraudulent or negligent, or where he has acted wilfully or in a wholly unauthorised and unlawful manner, he will only be allowed the costs of bringing the coal to bank, and not of severing or getting. Thus where a mine-owner commenced to work from his own mine into an adjoining mine vested in other persons, under the *bond fide* belief that he was about to obtain a contract authorising him so to work, it was held that the working ought to be treated on the same footing as if it had been commenced inadvertently, and that in taking an account of minerals gotten without authority the defendant ought to be allowed the cost of severing as well as the cost of bringing to bank. But after notice he was not allowed costs of bringing to bank (*Trotter v. Maclean*, 1879, 13 Ch. D. 574, where the cases are collected). In a case of coal trespass, it was held that "just allowances" do not mean profits (*In re United Merthyr Collieries Co.*, 1872, L. R. 15 Eq. 46).

[*Authorities.*—*The Annual Practice*, 1898, pp. 657, 658; Daniell's *Chancery Practice*, 6th ed., pp. 1054–1060; Morgan's *Chancery Acts and Orders*, 6th ed., p. 399; Robbins on *Mortgages*, 1897, pp. 1191 et seq.; Seton's *Judgments and Orders*, 5th ed., pp. 283, 995, 1159, 1638–1641.]



**Just before.**—On a demurrer to a plea justifying the shooting of a dog that “just before” it was shot it was worrying the defendant’s sheep, it was held that this averment amounted to a plea that “at the time when” the dog was shot it was worrying the sheep or that it was about to renew the attack (*Kellett v. Stannard*, 1851, 2 Ir. C. L. R. 156).

**Jus tertii**—The right of some third person. When a person is sued in respect of certain property he may sometimes set up as a defence that the title to such property is not in the plaintiff but in some third person. A bailee of goods, for example, although he cannot, as a general rule, dispute the title of his bailor may nevertheless, where the goods have been taken from him by a third party who claimed them by title paramount, set up the *jus tertii*, if there has been no fault on his own part (*Ex parte Davies, In re Sadler*, 1881, 19 Ch. D. 86).

## Justice of the Peace.

### TABLE OF CONTENTS.

1. COUNTY JUSTICE . . . . .	162	4. FEES ON TAKING OATHS . . . . .	165
<i>Qualification</i> . . . . .	162	5. PERSONS DISQUALIFIED . . . . .	166
2. BOROUGH JUSTICE . . . . .	164	6. WHAT ACTS MAY BE PERFORMED	
<i>Qualification</i> . . . . .	164	WITHIN AND WITHOUT COUNTY	166
<i>Jurisdiction</i> . . . . .	164	7. STIPENDIARY MAGISTRATE . . . . .	166
<i>Mayor, precedence of</i> . . . . .	164	8. JUSTICES’ ROOM . . . . .	167
3. RECORD OF APPOINTMENTS . . . . .	165	9. JUSTICES’ PROTECTION . . . . .	167

Justice of the peace is an inferior magistrate appointed by special commission under the Great Seal to keep the peace within the county for which he is appointed. “The whole Christian world,” says Lord Coke, “hath not the like office as justice of the peace, if duly executed.” The office of justice of the peace has been so much enlarged by the duties annexed to it that there remains scarcely a resemblance between the present office and that of the ancient conservators of the peace, out of which it has been gradually formed. Before the reign of Edward III. the conservators of the peace were chosen by the freeholders at large; but by the 1 Edw. III. St. 2, c. 16, it was enacted that thenceforth in every county certain persons should be assigned, that is, by commission, to keep the peace. The persons so assigned under the authority of that Act acquired, by the 34 Edw. III. c. 1, for the first time the legal title of justices of the peace. It is on these statutes the foundation of the office of justice of the peace depends. “The power of justices of the peace,” observes Lord Denman, C.J., in *R. v. Dunn*, 1840, 12 Ad. & E. p. 617, “is traced to a statute of Edward III. which was made the foundation of the commission of the peace, though some have thought that it did not warrant the Crown in granting so large an authority. We cannot,” he adds, “question the validity of the commission, which has been in operation for centuries.”

Justices for a county are appointed by the Crown. The appointment is usually made on the recommendation of the Lord Lieutenant of the county to the Lord Chancellor, but there are many instances in which the Crown has made the appointment without any such recommendation, and in some cases even contrary to the wish of the Lord Lieutenant. The qualification for a county is regulated by the Justices Qualification Act, 1744 (18 Geo. II. c. 20), and the Justices Qualification Act, 1875 (38 & 39 Vict. c. 54). A

justice for the county in general requires a qualification by estate or by occupation. The *estate qualification* is regulated by sec. 1 of the Justices Qualification Act, 1744: "No person shall be capable of being a justice of the peace or of acting as such for any county, riding, or division within that part of Great Britain called England, or the principality of Wales, who shall not have either in law or equity, to and for his own use and benefit, in possession, a freehold, copyhold, or customary estate for life, or for some greater estate, or an estate for some long term of years, determinable upon one or more life or lives, or for a certain term originally created for twenty-one years or more in lands, tenements, or hereditaments lying or being in that part of Great Britain called England, or the principality of Wales, of the clear yearly value of £100, over and above what will satisfy and discharge all incumbrances that affect the same, and over and above all rents and charges payable out of or in respect of the same; or who shall not be seized of, or entitled unto in law or equity, to and for his own use and benefit, the immediate reversion or remainder of and in lands, tenements, or hereditaments lying or being as aforesaid, which are leased for one, two, or three lives, or for any term of years determinable upon the death of one, two, or three lives, upon reserved rents, and which are of the clear yearly value of £300." It is further provided by sec. 13 of the Act of 1744 that that Act is not to extend to Her Majesty's judges, the eldest son or heir apparent of any peer or lord of Parliament, or of any person qualified to serve as a knight of a shire by 9 Anne, c. 5 (that is, of a person having a landed estate of not less than £600 per annum). The *occupation qualification* is contained in the Justices Qualification Act, 1875, sec. 1 of which provides: "Every person of full age, and who has during the two years immediately preceding his appointment been the occupier of a dwelling-house assessed to the inhabited house duty at the value of not less than £100 within any county, riding, or division in England and Wales, shall during that time have been rated to all rates and taxes in respect of the said premises, and who is otherwise eligible, shall be deemed to be qualified to be appointed a justice of the peace for such county, riding, or division"; but no justice appointed in respect of the *occupation* qualification shall continue to act as a justice after he shall have ceased for twelve calendar months to have within the county, riding, or division such qualification (38 & 39 Vict. c. 54, s. 1). As to the oaths required to be taken by a county justice, see 18 Geo. II. c. 20, s. 1, and 31 & 32 Vict. c. 73, ss. 6, 11; and as to the right to affirm, see 51 & 52 Vict. c. 46, s. 1. The oaths are the oath of allegiance, the judicial oath, and the oath as to qualification. They may be taken in open Court at the Quarter Sessions, for the county, or in any of the Divisions of the High Court of Justice. A County Court judge may be nominated as county justice although he does not possess the necessary qualification (County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 17). The chairman of a County Council, and the chairman of an urban or rural district council, unless a woman or personally disqualified, are *ex officio* county justices during their term of office (51 & 52 Vict. c. 41, s. 2; 56 & 57 Vict. c. 73, s. 22). The necessary oaths must be taken by them, save the oath as to estate. Where a chairman of a district council has been elected to that office at the expiration or on determination of a previous term of office, he may continue to act as a justice without again taking the oaths (59 & 60 Vict. c. 22). The oaths may be taken before two or more justices for the county in which the district is situate, sitting in petty sessions (see 59 J. P. 185).

Any person acting as a justice of the peace for a county without the

necessary qualification, or without taking the necessary oaths, is liable at the suit of a common informer to forfeit £100, half to go to the poor of the parish and half to the informer, and costs of suit (18 Geo. II. c. 20, s. 3; 39 & 40 Vict. c. 54, s. 2). Any person may obtain an attested copy of the documents signed by a justice on qualifying, upon application to the clerk of the peace, and payment of two shillings (18 Geo. II. c. 20, s. 2).

Justices for a *borough* having a separate commission of the peace are appointed by the Crown (Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 157). The Lord Chancellor in some cases adopts the recommendation of the town council, and in other cases acts quite independently of the council or their wishes. "A justice for a borough is not capable of acting as such until he has taken the oaths required to be taken by justices, except the oath as to qualification by estate, and made before the mayor or two other members of the council a declaration as in the Eighth Schedule" to the Municipal Corporations Act, 1882 (*ibid.* s. 157 (2)). The oaths that are thus required to be taken by a borough justice are the oath of allegiance and the judicial oath. On the 4th November 1871 Her Majesty appointed that the oaths to be taken by a mayor to qualify as a justice of the peace may be taken before any two justices for the borough of which he is mayor, or if there are no justices, then before any two councillors of such borough. On the 25th November 1882 Her Majesty appointed that the oath of allegiance and the judicial oath may be taken by the mayor in the manner mentioned *supra*; and by any justice of the peace before the mayor (*Arnold's Municipal Corporations*, 4th ed., by Mackenzie and Johnson, p. 170). The mayor of a borough without a separate commission of the peace is not authorised to take the oath of allegiance and judicial oath before two county justices; to prevent question it is advisable that the oaths should be taken before two councillors, and not aldermen (Home Secretary's Letter, 7th November 1892, 14 *Mun. Corp. Circ.* p. 387). A borough justice must, while acting as such, reside in or within seven miles of the borough, or occupy a house, warehouse, or other property in the borough (45 & 46 Vict. c. 50, s. 157 (3)). The seven miles will be measured in a straight horizontal line, and may be determined by the map made under the Survey, commonly known as the Ordnance Survey (*ibid.* s. 231). A borough justice need not be a burgess, or have such qualification by *estate* as is required for a justice of a county (see *supra*). The recorder of a borough is by virtue of his office a justice of the borough (*ibid.* s. 163).

The mayor is *ex officio* a justice during his year of office and the succeeding year. He takes precedence over all borough justices, and is entitled to take the chair at their meetings, except over justices acting in and for the county in which the borough or any part thereof is situate, unless when acting in relation to the *business of the borough*, or over any stipendiary magistrate engaged in administering justice (45 & 46 Vict. c. 50, s. 155). The law officers of the Crown advised in 1877 that this does not entitle the mayor of a borough to precedence over county justices sitting in petty sessions (see 48 J. P. 20). In 1889 they advised that the mayor and ex-mayor of a borough not having a separate commission of the peace, have as full authority as magistrates within the borough as is possessed by county justices within their county; and the mayor has precedence whenever he acts in the borough as a justice of the peace for the borough, whether he adjudicates upon cases arising within the borough under the general law of the land, or in matters relating to borough by-laws, or arising out of some local Act (see 53 J. P. 831). Where county justices, having refused to allow borough justices to take part in the

proceedings, committed S. for trial for an offence alleged to have been committed within the borough, the High Court quashed the order for committal, with costs against the county justices (*R. v. Williamson and Others, Durham JJ.*, 1891, 7 T. L. R. 534). The mayor of a borough without a separate commission of the peace has power as a justice to take a valid recognisance for the appearance of a person whom he has remanded for the next meeting of the justices for the county in which the borough is situate, and for whom he has accepted bail (*Wilson v. Strugwell*, 1881, 7 Q. B. D. 548, overruled on another point in *Herman v. Jeuchner*, 1885, 15 Q. B. D. 561). The law officers of the Crown have advised that the mayor and ex-mayor of such a borough can hold special sessions, and adjudicate summarily on indictable cases when sitting in a petty sessional court-house, but they are not entitled to appoint days for holding sessions. Such days must be fixed by the justices for the special division of the county in which the borough is situate (12 *Mun. Circ.* 1890, p. 231).

A borough justice shall, with respect to offences committed and matters arising within the borough, have the same jurisdiction and authority as a justice for the county has under any local or general Act with respect to offences committed and matters arising within the county; except that he shall not, by virtue of his being a justice for the borough, act as a justice at any Court of jail-delivery or Quarter Sessions, or in making or levying any county or borough rate (45 & 46 Vict. c. 50, s. 158 (1)). A justice shall not be disabled from acting in the execution of the Municipal Corporations Act, 1882, by reason of his being liable to the borough rate (*ibid.* s. 158 (2)).

If there is no Court of Quarter Sessions for a borough, the county justices have concurrent jurisdiction with the borough justices within the borough (*ibid.* s. 154 (1)). If the borough is a county in itself, the ordinary county justices would have no jurisdiction within the borough. No part of a borough having a separate Court of Quarter Sessions shall be within the jurisdiction exercisable out of Quarter Sessions by the justices of a county where the borough was exempt therefrom before the passing of the Municipal Corporations Act, 1835 (*ibid.* s. 154 (2)).

By the Crown Office Act, 1877 (40 & 41 Vict. c. 41), a record is to be kept at the Crown Office, and rectified from time to time, of the appointment of justices of the peace; and by rule 2 of the regulations under the Act, clerks of the peace and town clerks are required to send to the Crown Office in the month of January a statement of justices who have qualified, and, so far as they know, of justices who have died, during the preceding year.

The Home Secretary, by circular letter dated July 1894, recommended the Standing Joint Committees of counties to submit for approval a revised table of fees, in which the fees respecting oaths of office might appear in the table of clerk of the peace's fees as follows: "Fee to be paid by county justices, other than justices *ex officio* under any Act of Parliament, on qualifying as such, to include oaths, Crown Office fee, correspondence, and every other expense connected therewith, £2. Fee to be paid on administering oath of justice *ex officio* under an Act of Parliament on qualifying as such, and to all other persons, 5s." (see 58 J. P. 545, 546). No sum can be legally demanded as a fee of a justice unless it is authorised by the Table of Fees (*Maule v. White*, 1896, 60 J. P. 567). On the 12th of March 1895 the Secretary of State advised that the fee to be taken by a clerk to justices, in respect of administering the oaths at petty sessions to an *ex officio* justice, should be the same as the fee charged for administering an oath in any other kind of business according to the table of justices' clerks' fees for the time being in force (see 59 J. P. 185).

A person shall not, while he is sheriff of a county, act as a justice for that county, and if he does so act, all his acts done as such justice shall be void (50 & 51 Vict. c. 55, s. 17). A coroner is not disqualified from acting as a justice of the peace (*Davis v. Pembrokeshire, JJ.*, 1881, 7 Q. B. D. 513). Solicitors may be justices for a county, unless the same be a county in which they practise or carry on their profession (34 Vict. c. 18). When a debtor is adjudged bankrupt, he is disqualified in all parts of the United Kingdom from being appointed or acting as a justice of the peace. Such disqualification is removed and ceases if and when the adjudication of bankruptcy against him is annulled; or he obtains from the Court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part (46 & 47 Vict. c. 52, s. 32). No such disqualification is to exceed a period of five years from the date of the order of discharge (53 & 54 Vict. c. 71, s. 9). When a person who is a justice of the peace is reported by any Election Court or Election Commissioners to have been guilty of any corrupt practice in reference to an election, whether he has obtained a certificate of indemnity or not, it is the duty of the director of public prosecutions to report the case to the Lord Chancellor, with such evidence as may have been given of such corrupt practice; and where any such person acts as a justice of the peace by virtue of his being or having been a mayor of a borough, the Lord Chancellor has the same power to remove such person from being a justice of the peace as if he was named in a commission of the peace (46 & 47 Vict. c. 51, s. 38).

Justices have only power to execute judicial acts within their county or borough, but it is generally admitted that, so far as ministerial acts are concerned, a justice may perform such acts out of his county (cp. *R. v. Stainforth*, 1846, 11 Q. B. 66).

Within the boundaries of a county any justice placed on the commission of that county is *prima facie* capable of exercising at any place, for every purpose, the full powers of his office. He may act in any petty sessional division of his county, without confining himself to that in which he resides (*R. v. Beckley*, 1887, 20 Q. B. D. 187); except where the jurisdiction is limited to justices of the division, as under the Bastardy Acts and the grant of licences under the Licensing Acts.

If the council desire the appointment of a stipendiary magistrate for the borough, they may present a petition to the Secretary of State, and thereupon it shall be lawful for the Queen to appoint to that office a barrister of seven years' standing (45 & 46 Vict. c. 51, s. 161 (1)). He shall hold office during Her Majesty's pleasure, and shall by virtue of his office be a justice for the borough (*ibid.* s. 161 (2) (3)). He shall be paid, by equal quarterly payments, a yearly salary not exceeding, except with the consent of the council, that mentioned in the petition, as Her Majesty from time to time directs (*ibid.* s. 161 (4) (5)). On a vacancy, a new appointment shall not be made until the council again make the application as before, the first appointment (*ibid.* s. 161 (6)). More than one stipendiary magistrate may be appointed for a borough (*ibid.* s. 161 (7)). A stipendiary magistrate may also be appointed under the Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97). A stipendiary magistrate can act alone where two other justices are required (21 & 22 Vict. c. 73). He may act as one of the justices granting or confirming licences under the Licensing Acts within his jurisdiction (35 & 36 Vict. c. 98, s. 39). He cannot be appointed recorder for the borough (45 & 46 Vict. c. 80, s. 163 (6)). The appointment of a stipendiary magistrate does not exclude the other justices for the borough from sitting in Courts of summary jurisdiction. A deputy may be appointed

by the authority appointing the stipendiary magistrate, if by illness, absence, or other cause the latter is incapable of doing so (51 & 52 Vict. c. 23).

The council of a borough having a separate commission of the peace shall provide and furnish a suitable justices' room, with offices for the business of borough justices. No room in a house licensed for the sale of intoxicating liquors may be used for this purpose (45 & 46 Vict. c. 50, s. 160).

Justices are now protected in the faithful execution of their duty by the Justices Protection Act, 1848 (11 & 12 Vict. c. 44). Where an action has been brought against a justice for any act done by him within his jurisdiction, it is necessary to allege in the statement of claim, and to prove at the trial, that the act was done maliciously and without reasonable and probable cause (11 & 12 Vict. c. 44, s. 1); but if the act is done without or exceeding his jurisdiction, the action will lie without such allegation; but not for an act done under a conviction or order until the same has been quashed, nor for an act done under a warrant to compel appearance, if a summons were previously served and disobeyed (*ibid.* s. 2). Further provisions are contained in the Act; and see Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

All costs of justices out of session of a county, and all costs incurred by the justice in defending legal proceedings taken against him in respect of any order made or act done in the execution of his duty as such justice, shall, to such amount as may be sanctioned by the Standing Joint Committee of the County Council and Quarter Sessions, and so far as they are not otherwise provided for, be paid out of the county fund of the county, and the Council of the county shall provide for such payment accordingly (51 & 52 Vict. c. 41, s. 66). A similar provision is contained in the Municipal Corporations Act, 1882, s. 226, for the protection of a justice.

[See also JUSTICES' CLERK; SUMMARY JURISDICTION.]

**Justices' Clerk.** — *Appointment.* — 1. The justices for every petty sessional division of a county appoint one fit person to act as their salaried clerk. The appointment is during their pleasure. The same officer must discharge the duties of clerk of petty sessions and special sessions, and clerk to the justices (40 & 41 Vict. c. 43, s. 5; 51 & 52 Vict. c. 41, s. 84 (1)).

2. The appointment of chief and other clerks to the Metropolitan Police Courts is made by the Home Secretary under the Metropolitan Police Acts, 1842 and 1843 (2 & 3 Vict. c. 71, s. 5). They are not allowed to have any other occupation (2 & 3 Vict. c. 71, s. 5; 3 & 4 Vict. c. 84, s. 7).

3. The justices for a borough having a separate commission of the peace must appoint a fit person to be their salaried clerk, removeable at their pleasure, who must not be an alderman or councillor of the borough, or the clerk of the peace of the borough or of the county in which it lies, nor a partner of such clerk of the peace (40 & 41 Vict. c. 43; 45 & 46 Vict. c. 50, s. 159 (1) (2); Stone, *Justices' Manual*, 28th ed., 543; R. v. *Bodmin (Mayor)*, 1892, 40 W. R. 606).

4. Clerks to stipendiary magistrates outside the metropolis are appointed by the magistrates under 26 & 27 Vict. c. 97, s. 6; and the power of appointment appears to be unaffected by the Act of 1877 (see 40 & 41 Vict. c. 42, s. 5). They are removeable at the magistrates' pleasure.

The person appointed for borough or county must—

- (1) Be a barrister of not less than fourteen years' standing ;
- (2) Be a solicitor ;
- (3) Have served for not less than seven years as a clerk to a police or stipendiary magistrate, or to a metropolitan police magistrate, or to one of the Police Courts of the city of London (40 & 41 Vict. c. 43, s. 7).

The qualifications of clerks to Metropolitan Police Courts or stipendiary magistrates are regulated by 2 & 3 Vict. c. 71, s. 5 ; and 26 & 27 Vict. c. 97, s. 6 ; or in some cases by statutes relating to particular areas, *e.g.* Chatham and Sheerness, Manchester and Salford, Wolverhampton and the Potteries.

The appointment being during pleasure, *quo warranto* will not lie for the office (*R. v. Fox*, 1858, 8 El. & Bl. 939), nor it would seem *mandamus* to compel exercise of the power to appoint (*R. v. Bodmin (Mayor)*, 1892, 40 W. R. 606), and the clerk can be summarily dismissed, and is not entitled to any pension or compensation whatever the mode in which his employment is terminated (*Ex parte Sandys*, 1833, 4 Barn. & Adol. 863 ; 14 & 15 Vict. c. 55, s. 9 ; s. 81 of the Local Government Act, 1894). The only provision for compensation is in secs. 118, 120 of the Local Government Act, 1888, as to clerks in office at the passing of, and affected by the changes made by those Acts.

Justices' clerks in boroughs, and clerks of stipendiary magistrates, are forbidden, under penalties, to be concerned directly or indirectly, by themselves or partners, or otherwise, in the prosecution of any offender committed by the borough justices for trial at assizes or Quarter Sessions (26 & 27 Vict. c. 97, s. 6 ; 45 & 46 Vict. c. 50, s. 159 (3) (4) (5)). The offence was indictable under earlier Acts (*Fox v. R.*, 1859, 1 El. & El. 729). No such disqualification exists in counties, and it may be described as an established custom that justices' clerks should instruct and brief counsel on committals for trial from a county bench to county assizes or Quarter Sessions ; but the practice has met with judicial disapproval (*R. v. Bushell*, 1888, 16 Cox C. C. 367 ; 90 L. T. J. 104).

The justices' clerk of a petty sessional division or of a borough acts as clerk to the justices acting as a licensing authority (35 & 36 Vict. c. 94, s. 74), but is apparently, in respect to licensing matters, not subject to any statutory prohibition such as above stated.

*Duties.*—The duties of a clerk to justices are to assist the justices by advice, when required, as to matters of law and practice, to take depositions as to indictable offences, and to take minutes of all proceedings before the Courts of summary jurisdiction which he attends, and to transmit and account for all fines, penalties, or other moneys received by him as clerk (40 & 41 Vict. c. 43, s. 9). He is bound to keep a register of the minutes or memoranda of the convictions and orders of the Court, and to make returns and accounts in the forms prescribed by the Summary Jurisdiction Rules, 1886 (42 & 43 Vict. c. 49, s. 22).

The notices required formerly to be served by high constables are now served by the justices' clerk (32 & 33 Vict. c. 47, s. 3). In the case of committal for trial for indictable offences, it is his duty to transmit to the Court of trial the depositions, the statement of the accused, and the recognisances taken (38 Geo. II. c. 52, s. 7 ; 4 & 5 Will. IV. c. 36, s. 11 ; 2 & 3 Vict. c. 47, s. 36 ; 3 & 4 Vict. c. 84, s. 9 ; 11 & 12 Vict. c. 42, ss. 20, 22 ; 14 & 15 Vict. c. 55, s. 19 ; 22 & 23 Vict. c. 17, s. 2) ; and he is subject to penalties for neglect (7 Geo. IV. c. 64, ss. 5, 6). When the public prosecutor takes up a case, these documents go to him. And when a

prosecution is withdrawn or not proceeded with, the justices' clerk must inform the public prosecutor of the fact (42 & 43 Vict. c. 22, s. 5).

*Remuneration.*—Until 1851 justices' clerks were paid by fees and not by salary. In 1783 provision was made for settling the table of fees for counties by the Court of Quarter Sessions, subject to ratification by the justices of assize, or in Middlesex by the Lord Chief Justice of England. A copy of the table must be exhibited in every petty sessional Court; and a penalty is incurred for wilfully exacting higher fees (26 Geo. II. c. 14; 27 Geo. II. c. 16, s. 4; *Lewis v. Davis*, 1875, L. R. 10 Ex. 86; *Brown v. Blyth*, 1857, 7 El. & Bl. 26). In 1848 (11 & 12 Vict. c. 43, s. 30) these enactments were in substance repeated with reference to fees for proceedings under the Summary Jurisdiction Act, 1848. In the absence of an order of justices as to costs, the prosecutor or informant appears to be personally liable to the clerk for the fees incurred as a debt (*Drew v. Harris*, 1849, 14 J. P. 26; *R. v. Cole*, 1845, 8 Q. B. 82; *Reddish v. Hitchenor*, 1878, 48 L. J. M. C. 31). In the Metropolitan Police District the fees are fixed by the Home Secretary under 60 & 61 Vict. c. 26, s. 2.

In 1851 (14 & 15 Vict. c. 55) it was provided that justices in counties, and town councils in boroughs, might recommend that justices' clerks should be paid by salary in lieu of fees and other payments, and the salary which should be paid; whereupon the Home Secretary might order payment of all or any clerks wholly or partly by salary, and fix the salary. It is payable in remuneration for all business done by the justices' clerk.

In 1877 the payment of justices' clerks by salary for all business (except giving copies of depositions where excepted by Home Office Order) was made compulsory, subject to certain temporary provisions in particular cases (40 & 41 Vict. c. 43, ss. 1–3).

A clerk who is paid by salary must, under penalty, render quarterly, or at a less interval if directed by the local authority, an account of all fees received by him, which would, but for the Acts of 1851 and 1877, be retained for his own use. The account is rendered to the county or borough treasurer, and the fees applied in aid of county or borough rates (14 & 15 Vict. c. 55, s. 11; 40 & 41 Vict. c. 43, ss. 5–9; 42 & 43 Vict. c. 49, s. 29). When all the justices' clerks in a county or borough are paid by salary, the local authority can have the fees and penalties collected by means of stamps (32 & 33 Vict. c. 69). Under this Act the County Council is now the local authority (51 & 52 Vict. c. 41, s. 30; *Stone's Justices' Manual*, p. 546 n).

In consequence of these changes, local authorities can, subject to the approval of the Home Office, revise the table of fees settled under the Acts of George II. and repeated by sec. 30 of the Summary Jurisdiction Act, 1848, and the fees for copies of depositions (see 11 & 12 Vict. c. 42, s. 2), so as to make them higher or lower, according as the salary of the clerk is or is not likely to be covered by the fees in the table under revision (40 & 41 Vict. c. 43, s. 8); and justices, on application to them to enforce fees, can remit them wholly or in part; but must have an entry made of the amount remitted and the grounds of remission (14 & 15 Vict. c. 55, s. 12; 42 & 43 Vict. c. 49, s. 8).

The tables of fees are now settled by a joint committee of justices and the County Council (51 & 52 Vict. c. 41, s. 30).

Besides the fees contemplated by the Acts of George II., the following enactments gave fees to clerks to justices or of petty or special sessions:—

In proceedings under the Highway Act, 1835 (5 & 6 Will. IV. c. 50, s. 110);



For notices of special sessions for rating appeals (13 & 14 Vict. c. 101, s. 7);

With reference to stating a special case (20 & 21 Vict. c. 43, s. 3);

In proceedings under the Customs Acts (39 & 40 Vict. c. 36, s. 246, Sched. C).

And where an indictable offence is summarily tried, or the justices decline to commit for certain indictable offences, they *may* include the justices' clerks' fees in a certificate for costs, payable out of the local rates (29 & 30 Vict. c. 52, ss. 1, 2; 42 & 43 Vict. c. 49, s. 28).

All penalties, costs, and sums paid over to a justices' clerk, under a conviction or order, must, if not claimed, be accounted for, and paid over by the clerk to the treasurer of the county or borough (40 & 41 Vict. c. 43, s. 6).

The above provisions do not apply to a clerk of Metropolitan Police Courts or stipendiary magistrates or borough justices, if his salary is regulated by an Act other than 14 & 15 Vict. c. 55 (see 40 & 41 Vict. c. 43, s. 5).

Salaries and fees are regulated under 60 & 61 Vict. c. 26, ss. 2, 5, 7.

In the metropolitan police district the fees are paid over to the receiver of the district (2 & 3 Vict. c. 71, s. 46; *Wray v. Chapman*, 1850, 14 Q. B. 742).

The salaries of justices' clerks are paid—

(1) In the metropolis out of the police fund (60 & 61 Vict. c. 26, s. 1);

(2) In counties out of the county fund (51 & 52 Vict. c. 41, s. 84);

(3) In county boroughs out of the borough fund;

(4) In other boroughs out of the county fund (*In re Leominster*, [1895] 1 Q. B. 43; *Thetford v. Norfolk*, [1898] 1 Q. B. 141). This does not apply to clerks to visiting justices under the Lunacy Acts, which fall on the borough fund (case last cited).

[See *Stone's Justices' Manual*, 28th ed., 543–554.]

**Justification.**—This word has acquired a somewhat special meaning in actions for defamation. A “plea of justification” is a plea that the words complained of “are true in substance and in fact.” Such a plea is a complete defence to any action of libel or slander. For the object of civil proceedings is to clear the character of the plaintiff and to compensate him for any injury done to his reputation; and if the defendant has done no more than publish the literal truth about the plaintiff, he has done him no wrong; he has merely made manifest the plaintiff's real character. But very different considerations apply to an indictment or information for libel. For the object of criminal proceedings is to protect the public, to repress all acts which are likely to conduce to a breach of the peace; and the publication of the truth is at least as likely to lead to a breach of the peace as the publication of a falsehood. Hence at common law it was no answer to an indictment for the defendant to prove that his words were true. Indeed, the saying was, “the greater the truth, the greater the libel.” But this maxim never had any application to civil actions for damages.

#### I. IN CIVIL ACTIONS FOR DEFAMATION.

The plaintiff cannot recover any damages in an action of libel or slander if the defendant can prove that his words are true. He will not, however, be allowed to attempt to prove this unless he has given the plaintiff fair notice that such will be his defence, by placing a plea of justification on the record. If the defendant can prove his words true, it is wholly immaterial that he acted maliciously in publishing them. He has committed no tort, because he has merely brought the plaintiff's reputation down to its proper

level. Whatever loss the plaintiff may have suffered is *damnum absque injuria*. See INJURIA.

It is sometimes urged that the law is in this respect too severe on a plaintiff. Cases have no doubt occurred in which a cruel hardship has been inflicted on a man who was guilty of some indiscretion in his youth, but is now leading a blameless life. Is it right that a malicious defendant should be permitted to rake up and make public an ancient piece of misconduct, and thus destroy a reputation honestly earned by a virtuous after-life? But, as a matter of fact, people in such a case think worse of the defendant than of the plaintiff. And the very strictness with which a defendant is made to prove his plea of justification is, as a rule, a sufficient protection to a plaintiff; for if the defendant be really malicious, he is almost certain to go too far and say too much; and then his plea will fail.

It is always presumed in favour of a plaintiff that the defamatory words are false. He therefore need give no evidence denying the imputation; it is for the defendant to prove that his words are true. And the defendant must prove that the whole of the words set out in the Statement of Claim are substantially true. It is no defence that they are half true, or three-quarters true. If any material portion of the libel be not proved true, the plaintiff will be entitled to judgment on that issue (*Weaver v. Lloyd*, 1824, 2 Barn. & Cress. 678). The justification must be "as broad as the charge." Thus if a libellous paragraph in a newspaper is introduced by a libellous heading, it is not enough to prove the truth of the facts stated in the paragraph; the defendant must also prove the truth of the heading (*Mountney v. Watton*, 1831, 2 Barn. & Adol. 673; *Chalmers v. Shackell*, 1834, 6 Car. & P. 475; *Bishop v. Latimer*, 1861, 4 L. T. N. S. 775).

The defendant, moreover, must justify the precise charge made by the words. He is not allowed to plead that he published other words than those set out in the Statement of Claim, and that such other words are true. He must keep to the charge actually made. *E.g.* a defendant may not plead "to a Statement of Claim, alleging that the defendant had said the plaintiff stole a pair of boots, that what the defendant said was that the plaintiff's footman stole the boots, and that was true" (per A. L. Smith, L.J., in *Rassam v. Budge*, [1893] 1 Q. B. at p. 577).

*Repeating Words published by others.*—Again, if the libel complained of be "A. said that the plaintiff had been guilty of fraud," it is not enough for the defendant to plead that A. said so; that would be a bad plea. He must go further, and assert in his pleading, and prove at the trial, that the plaintiff had in fact been guilty of fraud (*McPherson v. Daniels*, 1829, 10 Barn. & Cress. 263). If he is not prepared to go that length, he must pay money into Court, and urge in mitigation of damages at the trial that A. did really say so, and that he, the defendant, honestly believed him (see *Tidman v. Ainslie*, 1854, 10 Ex. Rep. 63). The fact that the plaintiff has brought no action against A. is wholly immaterial; it does not even affect the amount of damages. Each man in turn is liable for his own defamatory words; and the person defamed may sue whom he likes, or sue no one, at his option (*R. v. Newman*, 1853, 1 El. & Bl. 558; 22 L. J. Q. B. 156).

*True in Substance.*—But though the defendant must justify the whole libel, still it will be sufficient if he can prove that every imputation contained in it is substantially true. A slight inaccuracy as to some detail will not prevent his succeeding, if such inaccuracy in no way alters the character of the imputation (*Morrison v. Harmer*, 1837, 3 Bing. N. C. at p. 767). But if the words which the defendant cannot prove to be true are a

material aggravation of the main imputation, or insinuate some further charge in addition to it, the plaintiff will be entitled to a verdict. The test always is, Did the libel as published have a different effect on the mind of the reader from that which the actual truth would have produced? Thus in the case of *Alexander v. North-Eastern Railway Co.*, 1865, 34 L. J. Q. B. 152, where the libel complained of stated that the plaintiff had been convicted of riding in a train for which his ticket was not available, and that he had been sentenced to be fined £1, or to three weeks' imprisonment in default of payment, proof that the plaintiff had been convicted of that offence and had been sentenced to be fined £1, or to a fortnight's imprisonment in default of payment, was held a sufficient answer to the action; for the error of one week could not have made any difference in the effect which the notice complained of would produce on the mind of the public. Contrast this with the later case of *Gwynn v. South Eastern Railway Co.*, 1868, 18 L. T. 738, where the defendants published placards stating that the plaintiff had been convicted and sentenced to pay one shilling with costs, or in default to three days' imprisonment "with hard labour." The words "with hard labour" formed no part of the sentence; yet they were printed on the placards in especially prominent type. They thus conveyed to the mind of the reader a wholly false impression as to the enormity of the offence which the plaintiff had committed; and the jury awarded the plaintiff £250 damages.

*Justifying Part of the Words.*—Although a plea of justification will not be a complete answer to the action unless it justifies the whole of the words, still the defendant is sometimes allowed, in mitigation of damages, to justify part only, provided such part contains a distinct imputation which can be separated from the rest. So he may sometimes justify as to one portion, and plead privilege or fair comment to the rest, provided the portion justified be fairly severable from the rest. To be fairly severable, it must be intelligible by itself, and must convey a distinct and separate imputation upon the plaintiff (*Davis v. Billing*, 1891, 8 T. L. R. 58). Thus if the defendant says that the plaintiff is a forger and an uncertificated bankrupt, he may plead that either of these charges is true, though he cannot prove the other; for they are distinct and separate imputations. But he will not be allowed to prove the truth of either charge, unless he has placed a special plea of justification on the record.

*Justifying the Innuendo.*—Again, where the plaintiff attempts to give the words a secondary meaning by the aid of an innuendo in his Statement of Claim (see DEFAMATION, vol. iv. p. 186), the defendant may plead generally that "the words are true in substance and in fact," and that will be taken to mean that he is prepared to prove them true in whatever sense the jury may find to be their proper meaning. Or the defendant may expressly refer to the innuendo, and justify the words either with or without the innuendo—that is, either in their primary or in their secondary meaning, whichever he pleases (*Watkin v. Hall*, 1868, L. R. 3 Q. B. 396). But there is risk in either course. If the defendant justifies the words with the innuendo, the jury will naturally infer that the innuendo is correct, that it expresses what the defendant really meant, and he will have to prove it true "up to the hilt." But if he justifies the words without the innuendo, then he can never say at the trial that the words are true in the secondary sense ascribed to them by the innuendo; and should the jury think that the innuendo assigns to the words their correct meaning, then his plea of justification goes by the board; it becomes an irrelevant plea. The words may be literally true; but that is wholly immaterial, if the jury find that they conveyed to the

reader a secondary meaning wholly distinct from their literal meaning (see *Williams v. Smith*, 1888, 22 Q. B. D. 134).

*Particularity.*—But in all these cases of justifying part only of the words, or of justifying with or without the innuendo, the defendant must always make it quite clear on his pleading or in his particulars how much he intends to try and prove true at the trial, and how much he does not. For the plaintiff is entitled to know, before he comes into Court, precisely what is going to be said against him, so that he may prepare to meet the charge (*Fleming v. Dollar*, 1889, 23 Q. B. D. 388). Where the words complained of are precise and convey a specific charge, it is sufficient to plead generally that that charge is true (*Gordon-Cumming v. Green and Others*, 1891, 7 T. L. R. 408). But where a vague general charge is made, as for instance that A. is a swindler, it is not enough to plead that A. is a swindler; the defendant must state in his plea or particulars the specific facts on which he intends to rely at the trial in order to prove A. a swindler (*Anson v. Stuart*, 1787, 1 T. R. 748; 1 R. R. 392; *Zierenberg and Wife v. Labouchere*, [1893] 2 Q. B. 183).

## II. IN CRIMINAL PROCEEDINGS FOR LIBEL.

If the libel is an attack on a private individual, then sec. 6 of Lord Campbell's Act, 1843, applies. By that provision a defendant is allowed to plead to any indictment or information for a libel on a private person, either by itself or in conjunction with a plea of Not Guilty, that his words are true, provided such plea contains a further averment that it was for the public benefit that such matters should be published. The particular facts which show that the publication was for the public benefit must be stated in the plea (see precedents in Odgers on *Libel and Slander*, 3rd ed., p. 715; and Crown Office Rules, 1886, Form No. 81). The defendant must prove the whole plea; otherwise judgment will pass for the Crown (*R. v. Newman*, 1852, 1 El. & Bl. 268, 558; 3 Car. & Kir. 252). If after such a plea the defendant is convicted, the Court will, in passing sentence, consider whether the guilt of the defendant is aggravated or mitigated by such plea, and by the evidence given to prove or disprove it (6 & 7 Vict. c. 96, s. 6).

The truth of the matters charged in the libel cannot be inquired into unless and until such a plea be filed. Hence a magistrate at a preliminary investigation of a charge of libel, whether at common law or under sec. 5 of Lord Campbell's Act, cannot receive or perpetuate any evidence of the truth of the matters charged (*R. v. Townsend*, 1866, 4 F. & F. 1089; 10 Cox C. C. 356; *R. v. Sir Robert Carden*, 1879, 5 Q. B. D. 1), unless the libel appeared in a newspaper, when sec. 4 of the Newspaper Libel Act, 1881, applies. (See NEWSPAPER.) If, however, the defendant is charged before the magistrate with an offence under sec. 4 of Lord Campbell's Act (i.e. with having published a libel, *knowing the same to be false*), it is open to him to give evidence of the truth of the libel; for if the words be true, he could not have known them to be false (*Ex parte Ellissen*, 1868, cited with approval by Lush, J., in 5 Q. B. D. at p. 13).

And wherever Lord Campbell's Act does not apply, the former rule of the common law remains in force. Thus in the case of a blasphemous, obscene, or seditious libel, no plea of justification can be received, and no evidence can be given of the truth of the words (*R. v. Duffy*, 1846, 9 Ir. L. R. 329; 2 Cox C. C. 45; *Ex parte O'Brien*, 1883, 12 L. R. Ir. 29; 15 Cox C. C. 180). For such proceedings are expressly excluded from the operation of sec. 6 of Lord Campbell's Act.

**Just or Convenient.**—These words are used in connection with the grant of injunctions. See INJUNCTION.

**Juvenile Offenders.**—1. Children under seven are deemed incapable of crime (*doli incapaces*). From seven to fourteen they are deemed capable of crime if proved to be of sufficient development (in which case it is said *malitia supplet aetatem*). In the case of sexual offences, boys are deemed incapable until they have attained fourteen years; but apparently they could be convicted of an attempt to have carnal knowledge (*R. v. Warte*, [1892] 2 Q. B. 600; *R. v. Williams*, [1893] 1 Q. B. 320). At fourteen, boys were in the Middle Ages sworn to the law and became fully subject to it, and at that age they are still in theory fully responsible.

2. In the case of all indictable offences, except homicide, a child over seven and under twelve may be summarily tried, if the parent or guardian is informed of the right to have the child tried by a jury and does not object to summary trial (42 & 43 Vict. c. 49, ss. 10, 49). The punishment must not, in case of imprisonment, exceed one month, or of fine, exceed 40s.; but a male child may be sentenced to receive not over six strokes of a birch rod from a constable in the presence of a superior police officer, and of the parent or guardian, if he wishes.

If the child is, in the opinion of the Court, not over seven, or not of sufficient capacity to commit crime, no liability to punishment is incurred (42 & 43 Vict. c. 49, s. 10 (5)).

3. Young persons (*i.e.* twelve or over and under sixteen) may be summarily tried for any indictable offence specified in column 1 of the first schedule to the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), if the Court think it a proper case, and the juvenile, on information of his right to be tried by jury, prefers summary trial.

The punishments to be awarded are imprisonment with or without hard labour for not over three months, or fine not exceeding £10, and if the offender appears not to be over fourteen he may also or alternatively receive not over twelve strokes of a birch rod from a constable in the presence of a superior police officer, and of the parent or guardian, if he wishes to be present (42 & 43 Vict. c. 49, s. 11; 29 & 30 Vict. c. 118, s. 14; 43 & 44 Vict. c. 15).

In addition to or substitution for the punishments awarded under 2. and 3. a Court, on conviction of an offender of either sex apparently under sixteen, whether summarily or on indictment, of an offence punishable with penal servitude or imprisonment, may send the offender to a certified reformatory school—

(a) If he appears not to be under twelve.

(b) If he has been previously convicted of a crime punishable by penal servitude or imprisonment (57 & 58 Vict. c. 48, s. 1). See REFORMATORY.

Provision is also made for sending to industrial schools (1) children apparently under fourteen who are found begging, wandering, destitute, or frequenting the company of thieves or prostitutes, or who are refractory and not under control of their parents, guardians, or the workhouse authorities (29 & 30 Vict. c. 118, ss. 16, 17); and (2) children apparently under twelve who are charged before justices with an offence punishable by imprisonment or fine, and have not been previously convicted of felony (29 & 30 Vict. c. 118, s. 15). See INDUSTRIAL SCHOOL.

These powers do not interfere with the right of the Court to dismiss a

charge as trivial, or to act under the First Offenders Act, 1887 (42 & 43 Vict. c. 49, s. 16; 50 & 51 Vict. c. 25). See FIRST OFFENDERS.

**Keating's Act.**—The popular title of the Summary Procedure on Bills of Exchange Act, 1855, which, though repealed as regards the High Court, is still in force as to proceedings in inferior Courts. Under this Act a plaintiff suing on a bill of not less than £10 or more than £50 is enabled to obtain speedy judgment, unless the defendant, showing a defence upon the merits, gets leave to defend (see *Annual County Courts Practice*, 1898, pp. 485 *et seq.*; see also vol. iii. at p. 543).

**Keeper, Lord.**—See LORD KEEPER.

**Keeper of the Records.**—See RECORD OFFICE.

**Keeping House.**—It is an act of bankruptcy for a person with intent to defeat or delay his creditors to “begin to keep house” (Bankruptcy Act, 1883, s. 4 (*d*)). If a person “secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the meaning of the legislature, and commits an act of bankruptcy” (*Dudley v. Vaughan*, 1808, 1 Camp. 270); but if a person when at home is denied to a creditor who merely demands payment of a debt but does not ask to see him personally, this is not evidence of a “beginning to keep house” (*ibid.*); nor is a mere direction by a debtor to his servant to deny him should a creditor call a “beginning to keep house” if the creditor does not call (*Fisher v. Boucher*, 1830, 10 Barn. & Cress. 705). The “beginning to keep house” must be with intent to defeat or delay creditors, but a debtor who keeps house and denies himself to a creditor, though not with the intention of defeating him, but rather with the view of gaining time for the purpose of paying his creditors, delays such creditor, and thus commits an act of bankruptcy (*Richardson v. Pratt*, 1885, 52 L. T. 614). See BANKRUPTCY.

**Keeping same in repair.**—Where premises are devised to a person for life, he “keeping same in repair,” the remainderman, in case the premises are allowed to go out of repair, has an action in respect of the same against the tenant for life, or, after his death, against his executors under 3 & 4 Will. IV. c. 42, s. 2 (*Woodhouse v. Walker*, 1880, 5 Q. B. D. 404; *In re Williames, Andrew v. Williames*, 1884, 52 L. T. 41). The measure of damages in such a case is the sum reasonably necessary to put the premises in the state of repair in which the tenant for life ought to have left them (*Woodhouse v. Walker, supra*).

**Keeping the Peace, Security for.**—Where on complaint to a Court of summary jurisdiction the complainant shows that he has grounds to apprehend that the defendant will do him, or his wife or

child, any bodily injury, the Court may require the defendant to enter into a recognisance with or without sureties in a specified amount to keep the peace and be of good behaviour towards Her Majesty and the lieges, and especially towards the complainant, during the period fixed by the Court; and, failing the defendant entering into this recognisance, he may be adjudged to be imprisoned for a specified time. This is the most usual way in which a person is bound over to keep the peace, but under various statutes the Court may require a prisoner to enter into a recognisance to keep the peace and be of good behaviour; for example, under sec. 117 of the Larceny Act, 1861, on the conviction of a person for any offence punishable under the Act, the Court may, in addition to awarding other punishment, require the prisoner to enter into his own recognisances and to find sureties for keeping the peace (see *Magistrates' Annual Practice*, 1898, pp. 653 *et seq.*).

**Keep out of the way.**—Under former regulations a vessel required to keep out of the way of another was permitted to do so in any way she thought proper. This, however, has been altered by the Regulations for Preventing Collisions at Sea of 27th November 1896, article 22 of which provides that "every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other" (see Marsden, *Collisions at Sea*, 4th ed., pp. 39, 449, 483). See COLLISIONS AT SEA.

**Kelp-shore.**—Kelp-shore seems to include the shore between high and low water-marks, but where land was conveyed "together with the kelp-shore" and so described by measurement as to exclude the land between high and low water-marks, it was held that the shore below high water-mark did not pass, and that parol evidence was not admissible to show the meaning of the term (*Boyle v. Mulholland*, 1859, 10 Ir. C. L. R. 150).

**Key, Delivery of.**—Goods may be delivered to a purchaser by, among other ways, delivery of the key of the warehouse or other premises in which the goods are. This mode of effecting delivery has sometimes been termed "symbolic delivery," but the better view seems to be that it is an actual transfer of the means of control over the goods. "The key is not a symbol in the sense of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by manual act, instead of word, may be called symbolic) that the transferor intends no longer to meddle with the goods" (Pollock and Wright, *Possession in the Common Law*, 68). In *Hilton v. Tucker*, 1888, 39 Ch. D. 669, Kekewich, J., dealt with the effect of delivery of a key at p. 676, where he said: "There are several cases cited on the interesting question of the effect of delivery of a key. I think, when they are examined, they all really come to this, that the delivery of the key, in order to make constructive possession, must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key; as, for instance, where timber is deposited in a warehouse. The delivery of the key is the symbol of possession where the possession itself is practically impossible. A man

being unable to carry about with him, or at anyrate to conveniently move to his own warehouse adjoining, a large quantity of timber, the delivery of a key giving exclusive control is regarded as delivery of possession itself. I think that principle runs through all the cases on delivery of the key as equivalent to possession." See POSSESSION.

**Kidnapping** is not a *nomen juris*, but means the forcible seizure and carrying away of any person of either sex or of any age. The offence, so far as relates to females under age, is dealt with by statute (see ABDUCTION, vol. i. p. 21). It is a form of assault and false imprisonment, but is usually spoken of mainly with reference to the carrying a person out of the realm, *e.g.* by illegal impressment (see *Flewster v. Royle*, 1808, 1 Camp. 187; *R. v. Lesley*, 1860, 29 L. J. M. C. 97), and this form of offence is specially punishable under sec. 11 of the Habeas Corpus Act, 1679 (*Designy's case*, 1682, Ray. T. 474).

It is a felony (1) unlawfully, either by force or fraud, to decoy or entice away or detain any child of either sex under the age of fourteen with intent (a) to deprive the parent, guardian, or other person having lawful care or charge of the child of the possession of the child, or (b) to steal any article belonging to any person which is upon or about the person of the child.

(2) With like intent to receive or harbour any such child with knowledge of the commission of offence (1). The offence is triable at Quarter Sessions, and punishable by penal servitude for three to seven years, or imprisonment with or without hard labour for not over two years; and in the case of a male offender under sixteen, also or alternatively by whipping. The penalties are not incurred by persons claiming the right to possession of the child, or by the mother or putative father of a bastard (5 & 6 Vict. c. 38, s. 1; 24 & 25 Vict. c. 100, s. 567; 54 & 55 Vict. c. 69, s. 1).

The force or fraud may be exercised either on the child or on its custodian (*R. v. Bellis*, 1893, 62 L. J. M. C. 155).

Proof that a child had been in the service of the accused, and was missing and cannot be found, and that the accused gave conflicting accounts of what had become of the child, has been held sufficient to warrant a conviction (*R. v. Johnson*, 1884, 15 Cox C. C. 481).

The provisions of the Prevention of Cruelty to Children Act, 1894, as to arrest, custody, procedure, and evidence, apply to these offences (57 & 58 Vict. c. 41, ss. 4, 5, 6, 11, 12-18, and sched.). It follows that the accused is a competent but not compellable witness, and the abducted child can give unsworn evidence.

The civil remedy for child-stealing or kidnapping is, in the case of illegal imprisonment beyond seas, under sec. 11 of the Habeas Corpus Act; and in other cases, by action for FALSE IMPRISONMENT; and the liberty of the abducted person can be restored by writ of HABEAS CORPUS. The remedy by the writ *de homine replegiando* is disused.

**Kin.**—See NEXT-OF-KIN.

**Kindred.**—"A man's 'kindred' in the proper signification of the word, means such persons as are related to him by blood; and accordingly relations by marriage are generally incapable of bringing themselves within the description of 'next-of-kin' in a will, and . . . neither husband nor



wife can be entitled under a bequest to the 'next-of-kin' of either of them (Williams, *Executors and Administrators*, 9th ed., 983). Relations by the half-blood are of "kin" to a person equally with those of the whole blood (*ibid.* 984). See NEXT-OF-KIN.

**Kings at Arms.**—Before the establishment of the College of Heralds the chief herald was called King of the Heralds, and subsequently King at Arms. As members of the College, they are Garter King at Arms, who is the Principal King at Arms; Clarencieux; and Norroy.

Each of the Royal Orders of knighthood, as the Garter, Bath, St. Michael and St. George in England, have a King at Arms attached to the Order and called by the name of the Order.

The Scotch Order of the Thistle has a King at Arms called Lyon King of Arms, who is also the head of the Lyon Court, which transacts all heraldic matters in Scotland similarly to the College of Arms in England, but with more definite legal powers. Similarly in Ireland the King of Arms of the Order of St. Patrick is Ulster King of Arms.

See ARMORIAL BEARINGS; HERALDS.

**King's Bench.**—See QUEEN'S BENCH DIVISION; SUPREME COURT.

**King's Enemies.**—This phrase in a bill of lading means, or at all events includes, the enemies of the sovereign of the person who made the bill of lading (*Russell v. Niemann*, 1864, 17 C. B. N. S. 163). It does not include traitorous subjects (Holmes, *Common Law*, 177), and probably only extends to States recognised as at war with the sovereign of the ship-owner (Scrutton, *Charter-Parties and Bills of Lading*, 3rd ed., art. 81).

**Kleptomania.**—A form of monomania manifesting itself in a propensity to commit theft. The defence of kleptomania has usually been urged in the case of persons charged with larceny whose social circumstances and character would seem to preclude the idea of a felonious intent. Naturally this defence is regarded with grave suspicion both by the Courts and by writers on medical jurisprudence. Dr. Luff (*Forensic Medicine and Toxicology*, vol. ii. 299) says that if the propensity to steal is due to an insane state the individual will show evidence of mental disease apart from the act of theft, as it is unlikely that the loss of the highest control would exclusively manifest itself in acts of larceny. In *R. v. Collins*, tried at the London County Sessions on 29th April 1895 (noted in Wood Renton on *Lunacy*, p. 912), the defendant, a dentist, who was indicted for stealing articles at his club, was acquitted on medical evidence that, though he was not insane, his mind was so affected as to remove the presumption of any felonious intent. See also LUNACY.

**Knight; Knighthood.**—The dignity of knighthood is non-hereditary. There are two great classes which have existed in England ever since the days of chivalry. First, the State Orders, consisting of (a) Knights Banneret Royal; (b) Knights Banneret of the secondary creation; (c) Knights of the Bath (not the military order hereinafter

mentioned); (d) Knights known as Equites Aurati; and (e) Knights Bachelor, or Bas Chevaliers. The first class were those dubbed by the king in person on the field of battle, under the Royal Standard. The second the same, except that it was not by the king in person. The former would take precedence, under a Royal Ordinance of 10 Jac. I., immediately after judges of the High Court, and before the younger sons of viscounts; the latter immediately after baronets. For the third class, see article BATH, ORDER OF THE.

The Equites Aurati were the great body of the ancient order of chivalry; they wore golden ornaments and spurs.

By the Royal Ordinance above referred to, all baronets and their eldest sons, being of age, are privileged to present themselves for this dignity; but the exercise of this privilege has fallen into disuse.

The most usual form of knighthood now conferred is that of the Knight Bachelor, as to which see BAS CHEVALIERS.

The Royal Orders are: the Order of the Garter; the Order of the Thistle (Scottish); the Order of St. Patrick (Irish); the Military Order of the Bath; the Order of the Guelphs or Hanover, which was instituted in 1815 when Hanover was erected into a kingdom, but became entirely foreign on the accession of her present Majesty when the kingdoms of England and Hanover were separated; the Order of St. Michael and St. George; the Order of the Star of India; and the Order of the Indian Empire. As to each of these Orders see the specific articles indicated below.

All these State Orders take rank and precedence before other knights, except knights banneret, both of the first and secondary creation, and their rank and precedence amongst themselves is in the order in which they are set out above; but commoners are hardly ever created Knights of the Garter, the Thistle, or St. Patrick, and therefore these knights do not depend on their knighthood for their precedence (see article PRECEDENCE). But between the Knights of the Garter and the Thistle there intervene a considerable number of degrees of precedence, e.g. all between Privy Councillors and baronets, including the judges of the High Court.

The history of the various classes of knights is not necessarily connected with the feudal system of land tenure. They belong much more to the history of chivalry, apart from land holding. But the holders of land by knight service were naturally in due course knighted in the chivalric sense of the word. This led, when both systems were dying out, to owners of lands of the value of £40 per annum being called upon by writ to receive or take upon them the order of knighthood; otherwise to make fine for discharge of the obligation. This was one of the grievances of the Long Parliament; and by the 16 Car. 1. c. 20 it was enacted that no person should henceforth be compelled to take upon him the order or dignity of knighthood.

See BATH, ORDER OF THE; ORDER OF THE GARTER; KNIGHTS OF THE THISTLE; KNIGHTS OF ST. PATRICK; ORDER OF THE GUELPHS OR HANOVER; KNIGHTS OF ST. MICHAEL AND ST. GEORGE; KNIGHTS OF THE STAR OF INDIA; KNIGHTS OF THE INDIAN EMPIRE; BAS CHEVALIERS OR KNIGHTS BACHELOR.

[*Authorities.*—Nicholas, *History of the Orders of Knighthood of the British Empire*; Burke, *Knighthage*; Dod, *Peccage, etc.*]

**Knight Harbinger**—An officer of the sovereign's household whose duty in old times was to ride a day's journey in advance of the court when travelling, to provide lodgings and other accommodation. The office was abolished in 1846.

[*Authority.*—*Notes and Queries*, 7th ser. xii. p. 477.]

**Knight Marshal**—An officer of the Court of the Marshalsea (*q.v.*), the Court of the household of the king, in which pleas of all trespasses committed within the king's house and verge of the Court were held; and where also all contracts and debts, where one of the parties was a member of the household, were cognisable. It has ceased to exist; its jurisdiction having been finally abolished by the County Courts Act, 1849 (12 & 13 Vict. c. 101).

[*Authority*.—St. Bl., 11th ed., vol. iii. p. 342, and vol. iv. p. 309.]

**Knights Bachelor** (*Bas Chevaliers*), **Knightage**, or **Knighthood**.—Knights bachelor were the lowest class of knights in the system of chivalry, of which five orders were enumerated as State Orders (Burke, *Knightage*, p. 1). Bachelor is said, somewhat doubtfully, to be a corruption of the words *bas chevaliers*. Knights bachelor are to be distinguished from the knights of the Royal Orders, as the Garter, Thistle, etc.; and especially from the knights BANNERET (*q.v.*), the only other existing State Order. Knighthood in the system of chivalry was distinct from feudalism, and was and is based upon personal and non-hereditary distinctions. Knights bachelor, commonly and distinctively known as the knightage, although no longer forming merely a military Order, still retains that characteristic feature.

The ancient title of "Sir" is the proper appellation of knights bachelor, and their degree is conferred upon them by "dubbing," or the accolade, personally performed by the sovereign, or by those acting under his authority; unless it is conferred by patent in their absence from the country.

Except the Lord Lieutenant of Ireland, to whom the right belongs by custom, no subject has now the power of conferring knighthood.

If recorded in the College of Arms (see ARMORIAL BEARINGS), the knighthood is gazetted, and precedence amongst the knights is regulated by the date of the gazetting. By patents, and ordinances, and Acts of Parliament, knights bachelor have been placed in rank below baronets and the other Orders of knighthood. The knights of the Royal Orders are made knights bachelor before the insignia of their Orders are conferred upon them. The knights bachelor themselves possess no insignia.

By the Statute 16 Car. I. c. 20, the obligation of all persons possessing a knight's fee, then reckoned at £40 per annum, to receive knighthood, was abolished.

**Knights Banneret**.—See BANNERET.

**Knight Service**.—This was the most honourable species of lay tenure in mediæval times. For each knight's fee (*q.v.*) the military service of one knight or fully armed horseman was due to the king by all his tenants *in capite*. In course of time this military tenure was extended to the tenants of mesne lords, but in their case the obligation of performing military service seems to have been gradually commuted for a money payment called scutage or escuage. In still later times these obligations became obsolete, but the burdensome incidents of relief, wardship, marriage, aids, etc., remained till abolished by 12 Car. II. c. 24, which converted all

lay tenures (except copyhold tenure and the honorary services of grand serjeanty) into free and common socage (see Williams, *Real Property*, 18th ed., pp. 14, 45-48, 53, and title TENURES).

**Knight's Fee**—A piece of land held by the tenure of knight's service (*q.v.*). It did not contain any certain number of acres, but is believed to have represented land of about the annual value of £20. "The word 'knight's fee' is a compound word and may comprehend many things. And therefore by the grant of this may pass land, meadow and pasture, as parcel of it. And sometimes by this doth pass so much land as to make a knight's fee; and some say it doth contain eight hides of land. And it seems also that a manor may pass by this name, if it be usually called so." (Shep. *Touch*, 92. 93).

**Knights of St. Michael and St. George.**—This Order of knights, known as The Most Distinguished Order of St. Michael and St. George, was instituted in 1818 for natives of the United States of the Ionian Islands, which then belonged to the English Crown, and of the Island of Malta and its Dependencies, and for such other British subjects as might hold high and confidential situations in the Mediterranean, or in the employment of the Ionian States. The Ionian States were ceded to Greece in 1863, and the Order was then completely reconstituted in 1868. The persons admissible into the Order were to be natural born or naturalised British subjects who had held office in, or rendered services in relation to, the colonies. It consisted of the sovereign, a Grand Master, twenty-five Knights Grand Cross, one hundred and twenty Knights Commander, and two hundred Companions, with power to appoint extra and honorary members. Several changes subsequently were made until in 1879 the services which might be rewarded by admission were extended to foreign affairs, and the numbers were increased to fifty Knights Grand Cross, one hundred and fifty Knights Commander, and two hundred and sixty Companions, exclusive of extra and honorary members who might be appointed. In 1886 the numbers were increased by eight Knights Commander and nine Companions, who subsequently became ordinary members; and the Order now stands increased to that extent.

The officers of the Order are: Prelate; Chancellor; Secretary; King of Arms; Registrar; Officer of Arms. The rank and precedence of the Order is immediately after the Order of the Star of India (*vide infra*). Thus, Knights Grand Cross after Knights Grand Commander of India, and so on.

[*Authorities.*—Statutes of the Order, 4th Dec. 1868; *London Gazette*, 1st July 1869, 30th May 1877, 24th May 1879, 28th June 1886, 21st March 1887; Burke, *Peerage, etc.*, p. 1623; Dod, *Peerage, etc.*, p. 53; *Book of Dignities*, p. 793.]

**Knights of St. Patrick.**—This Order was instituted in 1783. Originally it consisted of the sovereign, the Grand Master, who is Lord Lieutenant of Ireland for the time being, and fifteen knights, but in 1833 the number was permanently fixed at twenty-two knights. The officers of the Order are the Chancellor, who is the Chief Secretary for Ireland, to whom it was transferred in 1884 from the Archbishops of Dublin; Registrar and Ulster King of Arms; Secretary; Genealogist; Usher of the Black Rod; and Athlone Pursuivant. For a description of the insignia

of the Order, see Burke's *Peerage, Baronetage, and Knightage*, p. 1609. The Order has never been conferred on a commoner. In Ireland the precedence is immediately after the eldest sons of barons; but not in England, as in that case the knights would have precedence over Knights of the Garter, except whom no knight has precedence over baronets, who follow next after the eldest sons of barons. Apparently their precedence in the knighthood of the United Kingdom is immediately after the Knights of the Thistle (*q.v.*), and immediately before Knights Grand Cross of the Bath (*q.v.*). See KNIGHTHOOD.

[*Authorities*.—Burke, *Peerage*; Dod, *Peerage, etc.*]

**Knights of the Bath.**—See BATH, ORDER OF THE.

**Knights of the Chamber**—Such knights bachelor (*q.v.*) as are created in time of peace in the sovereign's chamber, and not in the field. They are so called in the Parliament Rolls of the time of Edward III.

See KNIGHT; KNIGHTHOOD; KNIGHTS BANNERET.

**Knights of the Garter.**—See ORDER OF THE GARTER.

**Knights of the Order of the Indian Empire.**—This Indian Order was established in 1878 for rewarding services rendered to Her Majesty and the Indian Empire, and to commemorate the adoption of the title of Empress of India. Originally it consisted of the sovereign, the Grand Master, and Companions; no knights being created; but in 1886 letters patent altered the constitution, so that fifty Knights Commander were to be appointed. In 1887 there was a further alteration, and the Order now consists of the sovereign, the Grand Master, who is the Viceroy of India for the time being, twenty-five Knights Grand Commander, fifty Knights Commander, and Companions not limited in number, with power to the sovereign to appoint any prince of the blood royal being descendants of George I. as extra Knights Grand Commander.

The officers are Registrar and Secretary; the style is "The Most Eminent Order of the Indian Empire." The members of the several grades of the Order rank next to, and immediately after, the corresponding classes of St. Michael and St. George (*vide supra*).

[*Authorities*.—Royal Warrant, 31st Dec. 1877; Letters Patent, *London Gazette*, 15th Feb. 1887 and 21st June 1887; Burke, *Peerage*, p. 1628; Dod, *Peerage*, p. 53; *Book of Dignities*, p. 804.]

**Knights of the Star of India.**—This Indian Order of knighthood was instituted in 1861. It consists now of the sovereign, the Grand Master, who is the Viceroy and Governor-General of India for the time being, thirty Knights Grand Commander, seventy-two Knights Commander, and one hundred and forty-four Companions; and there is power to appoint extra and honorary members. The statutes enable the sovereign to confer the dignity of Knight Grand Commander upon princes and chiefs of India who have entitled themselves to the Royal favour, and upon such British subjects as have by important and loyal services rendered by them

to the Indian Empire merited the Royal favour, and to confer the dignity of Knight Commander and Companion upon persons who by their conduct or services in the Indian Empire have merited the Royal favour.

The officers of the Order are a Registrar and a Secretary. It is styled "The Most Exalted Order of the Star of India." The precedence of the Order is immediately before that of the Order of St. Michael and St. George (*vide supra*).

[*Authorities*.—Statutes of the Order, 1866; *London Gazette*, 25th May 1875 and 1876; Burke, *Peerage*, etc.; Dod *Peerage*, etc.; *Book of Dignities*, p. 800.]

**Knights of the Thistle or of St. Andrew.**—This is a Scottish Order of knighthood, whose members rank next below knights banneret of the secondary creation in the table of general Precedence (*q.v.*); but as only Scottish noblemen of the highest rank are made knights of this Order, the knights take precedence otherwise than according to their knighthood; but as between the Orders of knights themselves, the members of this Order rank next to the Garter.

The Order was founded probably in 1500, though its evidently legendary account places it in the eighth century. During the reign of Mary Stuart it became nearly extinguished; but in 1687 James VII. of Scotland (James II. of England) issued his warrant for letters patent for reviving and renewing it. During the reign of William and Mary it became dormant; was revived in 1703 by Statutes and Orders of Queen Anne still in force, as modified by those of George III. in 1715 and George IV. in 1827. The sovereign is the head of the Order, and there are now sixteen knights, though the original number was twelve; and extra knights may be from time to time admitted by special statute. The Statutes and Orders above mentioned, detailing the ceremonies, insignia, dress, etc., are to be found in Burke's *Knightage of Great Britain and Ireland*.

The officers of the Order are: a Dean; a King of Arms, who is Lyon King of Arms, the chief heraldic official for Scotland; a Secretary; and Gentleman Usher of the Green Rod. The chapel of the Order is the Palace of Holyrood.

[*Authorities*.—Burke, *Knightage*, pp. 26–29; Dod, *Peerage*; *Book of Dignities*, 1890, p. 746.]

**Knock-out Sales.**—See AUCTION.

**Knowledge.**—See GUILTY MIND, GUILTY KNOWLEDGE, GUILTY INTENT; NOTICE; NOT TO MY KNOWLEDGE.

**Known Channel.**—See DEFINED AND KNOWN CHANNEL.

**Label.**—A narrow slip of paper, parchment, or ribbon attached to a deed to contain the appended seal.

In heraldry a label is a narrow horizontal bar or strip placed across the upper part of the shield, with pendants or points used as marks of cadency. In modern practice a label with three points depending marks the coat of

the eldest son during the lifetime of his father; one with five points, that of the heir-presumptive of his grandfather living; and so on. See also **TRADE MARKS**.

**Labourer.**—"A carpenter or a bailiff or a parish clerk is not called a labourer. A 'labourer' is a man who digs and does other work of that kind with his hands" (per Brett, M. R., in *Morgan v. London General Omnibus Co.*, 1884, 53 L. J. Q. B. 352, 353).

A man in possession was held not to be a labourer within 20 Geo. II. c. 19 (*Branwell v. Penneck*, 1827, 7 Barn. & Cress. 536). Artificers, handicraftsmen, miners, etc., do not properly fall under the denomination of labourers, "there being, as I take it, a known distinction between a journeyman in any art, trade, or mystery, or other workmen employed in the different branches of it, and a 'labourer'" (per Lord Ellenborough, C.J., in *Lowther v. Earl of Radnor*, 1806, 8 East, 113, 124).

A farmer, although personally performing manual work on his farm, is not a "labourer" within the Sunday Observance Act, 1677, s. 1 (*R. v. Silvester*, 1864, 33 L. J. M. C. 79), and it seems doubtful whether an agricultural labourer comes within the term as employed in the Act (*ibid.*).

An agreement for the hire of any labourer, artificer, manufacturer, or menial servant is exempt from stamp duty. Firemen and stokers employed on board a ship are "labourers" within the meaning of this exemption, and so also, apparently, are stokers hired to work an engine, stationary or moveable, on land (*Wilson v. Zulueta*, 1849, 14 Q. B. 405). A farm bailiff hired to work glebe lands at a yearly salary and share of profits was held to be a "labourer" within the same exemption (*R. v. Wortley*, 1851, 21 L. J. M. C. 44).

**Labourers, Statute of.**—The great mortality caused by the pestilence, the "Black Death," which swept over England in 1349, produced, as one of its effects, so great an increase in the price of labour that Parliament passed this statute fixing the wages which the various classes of labourers and workmen should receive, and providing that those who refused to serve on the terms mentioned should be punished with imprisonment. This statute was repeatedly re-enacted, but, after being long obsolete, was repealed by the Statute Law Revision Act, 1863.

**Labouring Classes.**—The Metropolitan Police Act, 1886, which enables the Receiver of the Metropolitan Police District to acquire land for the purpose of providing police stations, etc., prohibits (s. 5) the purchase of houses (if exceeding a certain number) occupied either wholly or partially by "persons belonging to the labouring classes," unless and until a scheme has been prepared and duly sanctioned for the re-housing of those to be displaced. "Persons belonging to the labouring classes" are defined (s. 5, subs. 7) as including "mechanics, artizans, labourers, and others working for wages, hawkers, costermongers, persons not working for wages but working at some trade or handicraft, without employing others, except members of their own family, and persons, other than domestic servants, whose income does not exceed an average of thirty shillings a week, and the families of any such persons who may be residing with them." (See also Standing Orders of the House of Commons, 183 a.)

**Labuan.**—A small island off the northern coast of Borneo, now administered as a British colony. In 1762 the East India Company established a factory on the island of Balambangan; in 1775 the staff was transferred to Labuan, and a factory was established at Brunei. In 1840 Sarawak in Borneo became an independent State under Rajah Brooke. Sarawak and the Sultanate of Brunei are still independent, but they are under the exclusive influence of Great Britain. Labuan was ceded to Great Britain in 1846, and occupied in 1848. The colony is administered by a Governor, who is empowered to make ordinances; he is not now assisted by a legislative council. In 1889 it was agreed that the Governor of North Borneo should act as Governor of Labuan. By the 29 & 30 Vict. c. 115 Her Majesty was empowered to place the island under the government of the Straits Settlements (*q.v.*), but this power has not been exercised. The laws of Labuan consist of the local ordinances, and of such general rules of English law as are applicable to the circumstances of the colony. A considerable portion of the Indian Codes has been adopted. The General Court consists of the Governor or his resident representative and two justices of the peace; the Imaum acts as assessor in cases to which the Mohammedan law applies. It appears that no regulations have been made for appeals to the Queen in Council.

By a charter dated 1st November 1881, the British North Borneo Company was empowered to administer a considerable tract of territory, held under grants from the Sultans of Brunei and Sulu; and by an agreement dated the 12th May 1888, the State thus formed was placed under the control of the British Government. The law administered in North Borneo is based on the Indian Codes. No provision has yet been made for appeals. By an Order in Council of 22nd November 1890, provision is made for the establishment of British Consular Courts in the native State of Brunei; appeals are to be taken to the Supreme Court of the Straits Settlements, and thence to the Queen in Council. All arrangements for the exercise of jurisdiction in Borneo are more or less tentative and subject to reconsideration.

[*Authorities.*—Labuan Ordinances and Colonial Office List. The Charter of the British North Borneo Company and other documents above referred to will be found in Hertslet's *Treaties*.]

**Lace.**—By the Carriers Act, 1830, s. 1, a common carrier by land is not liable for the loss of or injury to certain goods, among others, lace, which are above the value of £10, unless at the time of their delivery to such carrier their nature and value are declared, and, if demanded, an increased charge paid in respect of their carriage. The term "lace" there used does not include machine-made lace (Carriers Act Amendment Act, 1865, s. 1). Where a lace corporal, intended for use in the Holy Communion, was inserted in a gilt frame for the purpose of being exhibited at an exhibition, and, having been sent by rail, was lost in transit, it was held that the railway company, although not liable for the lace (its value not having been declared), were liable for the loss of the gilt frame, which was held to be distinct from, and not accessory to, the lace, as well as for the loss of the packing case (*Treadwin v. Great Eastern Ryw. Co.*, 1868, L. R. 3 C. P. 308).

**Laches.**—See ACQUIESCENCE.



**Lady.**—The wives of all peers bear the title of lady, corresponding and prefixed to the titles of their husbands. The daughters also of all peers of the rank of earl, marquis, or duke bear the courtesy title of lady prefixed to their family name. Wives of baronets, of all classes of knights, and of some officials are addressed by the same courtesy title; but, strictly speaking, lady is correlative with lord (*q.v.*), and indicates all those women of the families of peers who, or whose sons, bear the title of lord. The wives of all the sons of dukes and marquises, and of the eldest sons of earls, also bear the courtesy title of lady prefixed to the Christian name and surname of their husbands; but not the wives of younger children of earls, who only bear the courtesy title of honourable (*q.v.*).

The only exception to this dependence of the title of the woman on the father or husband is in the case of a peeress in her own right. The title lady would then belong to her independently.

[*Authorities.*—Burke, *Peerage*, etc.; Dod, *Peerage*.]

**Lady Court**—The Court of a lady of a manor (Wharton, *Law Lexicon*).

**Lady Day**—The 25th of March, being the Feast of the Annunciation of the Blessed Virgin Mary. It is a quarter-day in England and Ireland.

**Lagos**—An island on the Bight of Benin which has given its name to a British colony, organised as a separate government in 1863, made part of the West African Settlement in 1866, joined with the Gold Coast (*q.v.*) in 1874, constituted a separate colony by letters patent of 13th January 1886. The colony is administered by a Governor, who is assisted by an Executive and a Legislative Council. From the Supreme Court of the colony there is an appeal to the Queen in Council; for conditions of appeal, see PRIVY COUNCIL. The laws of Lagos are English in their origin, but the natives retain their own customs.

[*Authorities.*—Colonial Office List, and Lagos Ordinances.]

**Laity** (λαῖος).—The word is opposed to clergy, and signifies the community of the faithful not specially dedicated to the ministry, who having been received into the Church are entitled, unless excommunicated, to the benefit of her ministrations and sacraments. Apart from this division, certain laymen are in a certain sense ecclesiastics as holding an official position in some way connected with the Church. A layman as such is incapable "of tithes in perannuity," for tithes are in their nature purely spiritual; but a layman may hold tithes if he can produce some evidence of a tithe originally derived from an ecclesiastical corporation, as when he is in possession of the tithes of a dissolved monastery.

The sovereign is a *persona mixta*, as he partakes of the spiritual as well as of the ecclesiastical character.

As to Discipline over Laity, see DISCIPLINE, ECCLESIASTICAL.

[*Authorities.*—Phillimore, *Eccl. Law*, 2nd ed.; Engle on *Tithes*.]

**Lake**—A term generally applied to an expanse of fresh water entirely surrounded by land, or practically so; but there is nothing

to distinguish in its legal character the salt-water Caspian or Dead Sea from the fresh-water lakes of North America.

"The great inland lakes and their navigable outlets," says an American writer, "are considered as subject to the same rule as inland seas (*q.v.*). Where inclosed within the limits of a single State, they are regarded as belonging to the territory of that State; but if different nations occupy their borders, the rule of *mare clausum* (*q.v.*) cannot be applied to the navigation and use of their waters" (Halleck's *International Law*, ed. Sherston Baker, London, 1878, vol. i. p. 145).

The Crown has no *de jure* right to the soil or fisheries of an inland lake (*Bristow v. Cormican*, 1878, 3 App. Cas. 641). The ownership of the soil is in the riparian owner in the same way as the soil of a fresh-water river; although whether the rule that each adjoining proprietor, where there are several, is entitled in the case of large lakes *ad medium filum aquæ*, seems not so clear. In *Bristow v. Cormican*, *supra*, where the lake in question was Lough Neagh, Lord Blackburn said: "It does not seem very convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough many miles in length tacked on to his frontage."

In *Bloomfield v. Johnston*, 1867, Ir. R. 8 C. L. 68, it was decided by the Court of Exchequer Chamber in Ireland that the public have not of common right a common of fishery in large inland waters in which the tide does not flow or reflow, although they are navigable. In the later Irish case of *Bristow v. Cormican*, 1876, Ir. R. 10 C. L. 398, 412, the Courts felt bound by the decision in *Bloomfield v. Johnston*, *supra*. *Bristow v. Cormican* went to the House of Lords (*supra*), and the question was discussed but not dealt with in the judgments. Whether, therefore, the rule that the public cannot by prescription or otherwise obtain a legal right to fish in non-tidal rivers even though they are navigable (see *Smith v. Andrews*, [1891] 2 Ch. 678) is equally applicable to large navigable inland lakes, seems to be doubtful. In the case of small non-navigable lakes the right of fishing belongs *prima facie* to the riparian owners (Coulson and Forbes, *Law of Waters*, p. 101). See FISHERIES; RIVERS.

**Lambeth Degrees.**—See ARCHBISHOP.

**Lame Duck.**—In Stock Exchange slang this phrase denotes a stock-jobber who has not fulfilled his contracts, that is, a defaulter. It is actionable to apply the phrase to persons on the Stock Exchange (per Watson, B., in *Barnett v. Allen*, 1858, 27 L. J. Ex. 412).

**Lammas**—The first of August. The literal sense is "loaf-mass" (Anglo-Saxon, *hlaf*, a loaf, and *mæsse*, mass), because a loaf was offered on this day as an offering of first-fruits (Skeat, *Etymol. Dict.*). The date of the throwing open of Lammas Lands (*q.v.*) is Old Lammas Day (12th August). Lammas is a quarter-day in Scotland.

**Lammas Lands.**—Lands which are held in severalty during one half of the year, and for the other half, namely, from about Lammas Day (that is, as provided by 24 Geo. II. c. 23, s. 5, Old Lammas Day (12th

August)), whence they derive their name, till Lady Day, are thrown open to all those having the severalty right, and generally also to a considerably larger class. Lammas lands are usually in grass, but the term is also applied occasionally to arable lands. The commoners upon these lands are sometimes an indefinite class, such as the inhabitants of a parish, but for such a class to take, the right must be vested in some persons as trustees for their benefit; sometimes, again, the right is in a limited class, as the freemen of a borough or the tenants of a manor; and perhaps, more generally, in the owners or occupiers of ancient tenements within a parish (Cooke, *Inclosures*, 4th ed., pp. 47, 48; Elton, *Commons and Waste Lands*, p. 36). In Mr. Seebohm's *English Village Community*, an instance of lammas lands occurring in the township of Hitchin is given (see Appendix, p. 452). On the lands there mentioned the occupier of every ancient messuage or cottage within the hamlet of Walsworth had the right of turning two cows and a bullock or yearling cow calf on to the land "upon and from Old Lammas Day until Old Lady Day." The extent of the right of pasturage is regulated in each case by custom, or it may be by means of a by-law (Elton, *supra*, p. 39). In order to make a right of pasture over lammas lands appurtenant to particular lands there must be some relation between the enjoyment of the right and the enjoyment of the particular lands; that is, there must be some connection between the beasts used on those particular lands and the number or description of beasts that may be depastured; as, for instance, where the right claimed is for the beasts which plough the particular lands; or every beast used on such lands not exceeding a certain number (*Baylis v. Tysen-Amhurst*, 1877, 6 Ch. D. 500). See COMMONS.

Lammas lands may be inclosed under the Inclosure Acts. See INCLOSURE ACTS.

**Lancaster, Duchy and County Palatine of.**—A county palatine (cp. DURHAM) is said to be so called *a palatio*, because the ruler had within its limits the same powers (*jura regalia*) as the king in his palace. The palatinate of Lancaster was created by charter of 25 Edw. III., and conferred upon Henry Plantagenet, Earl and subsequently first Duke of Lancaster; from him it passed by the marriage of his heiress, Blanche, to John of Gaunt, who was created Duke of Lancaster. Henry IV., son of John of Gaunt, assured it to himself and his heirs separate from the Crown; and it was finally in the first year of Henry VII. united to the Crown under a separate governance (Steph. *Com.*, 11th ed., vol. i. pp. 133–136; cp. 4 *Co. Inst.* and Hardy's *Charters of the Duchy of Lancaster*). The Duchy of Lancaster, on the other hand, in the language of Blackstone (vol. iii. p. 78), "is a thing very distinct from the County Palatine of Lancaster, inasmuch as it includes much territory at a distance from the County Palatine, and particularly a very large district surrounded by the city of Westminster." In this connection, as matter of historical interest, reference may be made to the old Court of the Duchy Chamber of Lancaster, which had concurrent jurisdiction as to matters in equity relating to lands holden of the Crown in right of the Duchy of Lancaster (*Black. loc. cit.*). This Court no longer sits, but has never been expressly abolished.

By the Revenue, Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72), s. 24, for the removal of doubts as to whether the right of Her Majesty to escheats, forfeitures, personal estate of intestates, fines and estreated recognisances within liberties of the Duchy of Lancaster not

situated in the county of Lancaster is vested in Her Majesty in right of her Crown or in right of her Duchy of Lancaster, it was enacted that all such rights should be deemed to have been vested in Her Majesty in right of her Crown as and from the 1st of January 1881, and that immediately after the passing of the Act, the sum of £15,000 should be paid out of the Consolidated Fund to the Receiver-General of the Duchy of Lancaster and applied in like manner as sums arising from sales under the Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58). The same rights within the county of Lancaster continue to be vested in Her Majesty in right of her Duchy of Lancaster as before, as part of the *jura regalia* of the palatinate. Thus under the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), s. 2, subs. 6, it is provided that all rules under the Act for regulating procedure as to escheats in case of inquiries as to the title of Her Majesty in right of her Duchy of Lancaster, are to be made by the Chancellor of the Duchy, with the approval of the Lord Chancellor. Another instance of the *jura regalia* is the right to foreshore, which within the county of Lancaster is exercised by the sovereign in right of the Duchy and not of the Crown, through the administrative medium of the Duchy of Lancaster Office. On principle, no doubt, all rights of the Crown within the County Palatine should be exercisable in right of the Duchy; but some matters have evaded the palatine jurisdiction, such as the incorporation of boroughs, in which respect Lancashire is not distinguished from the rest of England. In the case of the *Attorney-General of the Duchy of Lancaster v. Duke of Devonshire*, 1884, 14 Q. B. D. 205, wherein the history of the Duchy was much discussed, it was decided that it is not competent for the Attorney-General of the Duchy to exhibit an information in the High Court of Justice.

The County Palatine of Lancaster formerly had its own Courts both of law and equity. Indeed, the *jura regalia* comprised the sole administration of justice within the limits of the County Palatine. Ordinary writs ran not into a County Palatine. Thus all process issuing out of the superior Courts at Westminster, and intended to be executed in the County Palatine used to be directed in the first instance to the Chancellor thereof, who thereupon issued his mandate to the sheriff. So, too, commissions of assize in the County Palatine of Lancaster were issued under the seal of the Duchy, and these, together with commissions of the peace, were specially exempted from the general transfer to the Great Seal effected by 27 Hen. VIII. c. 24 (see *ibid.* s. 4). But the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 99, enacted that the County Palatine of Lancaster should cease to be a County Palatine so far as respects the issue of special commissions of assize or other like commissions, but not otherwise, and that commissions might be issued for trial of all causes and matters, as in other counties.

This section does not apply to commissions of the peace, so that the appointment of justices of the peace rests with the Chancellor of the Duchy. It may be mentioned that, as a matter of administrative practice (though this practice has been varied), justices of petty sessional divisions that are not boroughs are now appointed under the seal of the County Palatine upon the recommendation of the Lord Lieutenant following the analogy of other counties. The Judicature Act, 1873, s. 95, further contains a saving as to the Chancellor of the County Palatine, except as in the Act directed (see *post* as to appeals).

All legal patronage, as a general rule, within the County Palatine, is exercised by the Chancellor of the Duchy in virtue of the *jura regalia*, but to this rule appointments of recorders and grants of Quarter Sessions form an exception.

The Judicature Act, 1873, s. 16 (9), transferred to the High Court the jurisdiction of the Court of Common Pleas at Lancaster, but did not affect the Chancery jurisdiction of the County Palatine except as regards appeals. The Court of Chancery of the County Palatine of Lancaster is regulated by three statutes of the present reign which have materially extended its powers, namely, the Chancery of Lancaster Acts, 1850 (13 & 14 Vict. c. 43), 1854 (17 & 18 Vict. c. 82), and 1890 (53 & 54 Vict. c. 23). Under the Acts of 1850, s. 1, and 1854, s. 6, the Chancellor of the Duchy, with the advice and consent of the Vice-Chancellor of the County Palatine, has power to make rules for the Chancery Court, subject, by virtue of the Act of 1890, s. 6, to the approval of the authority for the time being empowered to make rules for the Supreme Court (in substitution for the advice and consent of a Lord Justice of Appeal under the Act of 1854). To get rid of doubts, the lunacy jurisdiction of the Palatine Court was expressly abolished by the Act of 1850, s. 23. Moneys may be paid into the Palatine Court under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), the Trustee Relief Act (10 & 11 Vict. c. 96), and Trustee Act, 1893 (56 & 57 Vict. c. 53), for which purpose accounts are kept at any branches of the Bank of England within the county of Lancaster in the names of the clerk of the council of the Duchy of Lancaster and the registrar and comptroller of the district (Act of 1854, s. 13). All fees are to be paid into the "Fee Fund," which is devoted by Royal warrant to purposes of the Court.

The Act of 1850, s. 12, conferred upon the Palatine Court, so far as regards persons and property within the limits, the summary jurisdiction of the High Court of Chancery alike under all then existing and subsequent Acts. And, generally speaking, the special powers (or at least the more important of them) conferred upon the Chancery Division of the High Court by modern statutes were expressly extended to the Palatine Court. Apart from these, it was established by judicial decisions that the jurisdictions of the High Court and the Palatine Court were co-ordinate (*In re Alison*, 1878, 26 W. R. at p. 453, per Jessel, M. R., the report in the Law Reports seeming to be inaccurate; cp. *Wynne v. Hughes*, 1859, 26 Beav. 377; *Bradley v. Stelfox*, 1862, 3 De G., J. & S. 402); and that the jurisdiction of the Palatine Court was that of the old Court of Chancery within the boundary (*In re Longdendale Cotton Spinning Co.*, 1878, 8 Ch. D. 150; 26 W. R. 491). With reference to jurisdiction to try patent cases under the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), doubts arose owing to the omission of special mention of the Palatine Court in the statute (see *Winter v. Baybut*, 1884, 1 R. P. C. 76; *Procter v. Sutton, Lodge Chemical Co.*, 1888, 5 R. P. C. 185; *Procter v. Bayley*, 1889, 42 Ch. D. at p. 398, per Cotton, L.J.). But by the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 3, it is provided that the Lancaster Chancery Court shall, as regards all persons, bodies corporate, and property within or becoming subject to its jurisdiction, have and exercise the like powers and jurisdiction as the High Court in its Chancery Division now has and exercises or may under any Act of Parliament hereafter passed and not expressly enacting to the contrary, have and exercise, in respect of persons, bodies corporate, and property within its jurisdiction.

With reference to the extent of the jurisdiction and the conditions of its exercise, in *In re Longdendale Cotton Spinning Co.*, *ubi supra*, the defendants were within, but the property was without, the limits of the County Palatine. It was held that the jurisdiction, being that of the late High Court of Chancery, was *in personam*, and that the Palatine Court could therefore exercise jurisdiction over the property, and could enforce any order by

applying to the Court of Appeal of the Supreme Court for an order under the Chancery of Lancaster Act, 1854 (17 & 18 Vict. c. 82, s. 7), and the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 18 (2)).

Under the Court of Chancery of Lancaster Act, 1854 (17 & 18 Vict. c. 82), s. 8, where any person who is a necessary or proper party to any proceedings in the Palatine Court is not subject to the jurisdiction of that Court, the Court of Appeal may either order the matter to be transferred to the High Court, or order service out of the jurisdiction of the Palatine Court. With reference to this section, it was held in *In re Watmough*, 1883, 24 Ch. D. 280, that service out of the jurisdiction on a sole defendant, if it could be granted at all (as to which *quære*), could only be granted under very special circumstances. In *Cooke v. Smith*, 1889, 44 Ch. D. 72, where the principal defendant resided out of the local jurisdiction, an application to the Court of Appeal on the part of such defendant to have the action transferred to the High Court was successful. See also, with reference to the rules hereon of the Palatine Court, *Walker v. Dodds*, 1888, 37 Ch. D. 188.

Under the Court of Chancery of Lancaster Act, 1850 (13 & 14 Vict. c. 43), s. 15, where an order of the Palatine Court cannot be enforced by reason of the party to be bound not being within the jurisdiction, the order may be made an order of the High Court on application to the Chancery Division. In *Duke v. Clarke*, 1894, W. N. 100, it was held that an application under this section was properly made *ex parte*, but that a "transcript" of the judgment, as required by the section, and not the original judgment, must be produced.

Under the Chancery of Lancaster Act, 1854 (17 & 18 Vict. c. 82), s. 1, the Court of Appeal in Chancery of the County Palatine was composed of the Chancellor of the Duchy and the two Lords Justices of the Court of Appeal in Chancery, the two last being substituted for two judges of assize under the earlier practice; but under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 18 (2), and the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 4, the old Palatine Appeal Court is abolished, and the Court of Appeal of the Supreme Court has as to all judgments and orders of the Lancaster Chancery Court the like jurisdiction as with respect to the High Court.

Mention must be made in conclusion of the Salford Hundred Court of Record, regulated by Local Acts of 1846 (9 & 10 Vict. c. 126) and 1868 (31 & 32 Vict. c. 130). The area of the jurisdiction comprises the whole of the extensive and populous hundred of Salford, including the city of Manchester. The jurisdiction itself extends to—(1) personal actions in which (except where the parties consent to the jurisdiction) the debt or damages to be recovered do not exceed £50; (2) actions of ejectment between landlord and tenant where the annual rent or value does not exceed £50, and where no fine has been paid, reserved, or made payable in respect of the land; (3) any action whatever (except actions for libel, slander, or debauching the plaintiff's daughter or servant, wherein the sum to be recovered exceeds £50), with the consent of the parties (31 & 32 Vict. c. 130, s. 6). Sittings for trial of issues of law and fact are held at least six times in each year, at intervals of not more than three months (*ibid.* s. 9). The judge must be a barrister of ten years' standing (*ibid.* s. 14), and provision is made for trial by jury of issues of fact (*ibid.* ss. 67, 68 *et seq.*), and for any party dissatisfied with a verdict or judgment moving for a rule in the superior Courts (*ibid.* s. 91).

[*Authorities.*—Hardy's *Charters of the Duchy of Lancaster*; Snow and Winstanley's *Chancery Practice, Lancaster*.]

**Lancaster Lunatic Asylums.** — See ASYLUMS BOARDS, vol. i. p. 396.

**Land Charges.**—A land charge, as defined by sec. 4 of the Land Charges Registration and Searches Act, 1888, means “a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses, incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.” This definition, although in terms wide enough to include all charges created under the provisions of any Act of Parliament, is controlled by sec. 10 of the statute (which deals with the registration of charges, see *infra*), and includes only such charges as are created under the provisions of any statute at the wish of, and in consequence of an application by, the owner of lands (*R. v. Vice-Registrar of Office of Land Registry*, 1889, 24 Q. B. D. 178); therefore, expenses incurred by a local authority, which are recoverable from the owner of premises and, until recovery, are made a charge on such premises by sec. 257 of the Public Health Act, 1875, are not a “land charge” within the meaning of the Act of 1888 (*ibid.*). The most important public Acts, in addition to those mentioned above in the definition clause, under which land charges falling within this statute may arise, are the Improvement of Land Act, 1864 (see ss. 49-71), and the Public Health Act, 1875, s. 240. It seems doubtful whether a charge created under sec. 36 of the Housing of the Working Classes Act, 1890, is within the Act of 1888, as provision is specifically made for the registration of such a charge if relating to a dwelling-house within either of the registry counties of Middlesex or Yorkshire, in the registry of such county “in like manner as if the charge were made by deed by the absolute owner of the dwelling-house,” and this might be held to imply that no other registration is necessary. Besides these public general statutes, there is a considerable number of local and personal Acts, under which charges may occur which come within the Act of 1888 (see a number of these collected in Elphinstone and Clark, *Searches*, pp. 117-124; but the list there given must be read subject to the decision in *R. v. Vice-Registrar of Office of Land Registry* (*supra*), which was subsequent to the publication of Elphinstone and Clark’s work).

**Registration.**—A register of land charges is established by the Act (s. 10). This register is kept at the Office of Land Registry, and land charges may be registered therein in the manner prescribed by the Act and rules made thereunder. Land charges created after the commencement of the Act, *i.e.* 1st January 1889, are void as against purchasers for value of the land charged therewith, or of any interest in such land, “unless and until” such land charges are registered in the register provided by the Act (s. 12). The words “unless and until” in this section might indicate that by the registration of a land charge, subsequent to a purchase for value of the land charged, the charge would be revived as against the purchaser; but it is believed that in accordance with the view taken by Sir John Romilly, M. R., in *Hargrave v. Hargrave* (1857, 23 Beav. 484), on similar

words occurring in 1 & 2 Vict. c. 110, s. 19, registration will have no retrospective effect. In the case of a land charge created prior to the commencement of the Act, sec. 13 provides that "after the expiration of one year from the first assignment by act *inter vivos*, occurring after the commencement of this Act," of such a land charge, "the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges . . . prior to the completion of the purchase." The expenses incurred by a person entitled to a land charge created prior to the Act in causing his charge to be registered, are deemed to form part of the charge, and are recoverable by him accordingly on the day for payment of any part of the charge next after such expenses have been incurred (s. 11).

In the case of freehold land the registration is in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge (s. 10 (1)); in the case of copyhold land the registration is in the name of the tenant on the Court-rolls at the time of the creation of the charge (s. 10 (2)). Where a charge has been created pursuant to an application by or on behalf of a person beneficially entitled to a lease for lives or a life at a rent or to a term of years, the charge is to be registered also in the name of that person (*ibid.*).

The register, besides furnishing particulars of the name, address, description, and capacity of the person in whose name the registration is made, gives the date of the charge, the statute under which it is made, the parish in which the land charged is situated, the date of registration, and the name and address of the applicant for registration, or of his solicitor (if any). (Land Charges Rules, 1889, r. 1 (3).)

An alphabetical index is kept at the Office of Land Registry of all entries of land charges (Act, s. 15); and searches may be made (ss. 16, 17). See SEARCHES.

The registration of a land charge may be vacated pursuant to an order of the High Court or any judge thereof (s. 14).

See ANNUITIES; RENT-CHARGE.

[*Authorities.*—Elphinstone and Clark, *Searches*, c. ix. and supplement; Hood and Challis, *Conveyancing and Settled Land Acts*, 4th ed., pp. 400–409.]

**Land Commissioners.**—By sec. 48 of the Settled Land Act, 1882, the Inclosure Commissioners (*q.v.*) for England and Wales, the Copyhold Commissioners, and the Tithe Commissioners (*q.v.*) for England and Wales were reconstituted as one body, called the Land Commissioners for England, who, however, have now been superseded by the Board of Agriculture (*q.v.*).

**Land covered with Water.**—A wet dock was held to be "land covered with water" within sec. 55 of the Local Government Act, 1858, in *R. v. Newport Dock Co.*, 1862, 31 L. J. M. C. 266; see also *R. v. Birmingham Waterworks Co.*, 1861, 1 B. & S. 84.

In *R. v. Regent's Canal Co.*, 1827, 6 Barn. & Cress. 720, it appeared that the canal company's Act dealt with "lands whether covered with water or not"; and in *R. v. Leeds and Liverpool Canal Co.*, 1838, 7 Ad. & E. 671, Pattison, J., said (p. 685) that land was not the less land for being covered with water.



**Land Drainage Acts.**—See DRAIN, DRAINAGE; IMPROVEMENT OF LAND.

**Landed.**—Landing goods means putting them upon the land, or upon that which, by custom of the port, is its equivalent; but placing goods into lighters, which are to take them to an export vessel as soon as she is ready to receive them, is, however usual in trade, not the same thing as “landing” the goods directly and immediately upon the quay (per Bowen, L.J., in *Houlder v. Merchants Marine Insurance Co.*, 1886, 17 Q. B. D. 354); therefore a policy of insurance on goods, which included all risk of craft until the said goods were “safely landed,” was held not to cover the risk to the goods while lying in lighters for transhipment into an export vessel (*ibid.*).

Under a local Act a corporation was entitled to levy tolls on all goods “landed” within their harbour. In pursuance of a long-continued practice, stones brought along the coast into the harbour were shot from the boats in which they were loaded on to the shore, below high-water mark, where they lay till shipped for exportation. On these facts it was held that the stones were not “landed” so as to entitle the corporation to levy tolls on the same (*Harvey v. Lyme Regis Corporation*, 1869, L. R. 4 Ex. 260).

**Landed Estates (Ireland).**—See IRELAND, *ante*, p. 76.

**Land-gable**—A rent or tax issuing out of land, amounting, according to Spelmann (*Glossary*), to a penny in the case of each house. It is mentioned in Domesday Book.

## Landlord and Tenant.

### TABLE OF CONTENTS.

CREATION OF THE TENANCY . . . . .	194	Assignment . . . . .	242
Introduction . . . . .	194	Attornment . . . . .	249
Parties . . . . .	201	Execution . . . . .	249
Parcels . . . . .	205	Bankruptcy . . . . .	250
The Term . . . . .	210	Death . . . . .	252
Covenants . . . . .	214	Underlease . . . . .	253
Rent . . . . .	227	DISSOLUTION OF THE TENANCY . . . . .	253
DEVOLUTION OF THE TENANCY . . . . .	242	Forfeiture . . . . .	254

### CREATION OF THE TENANCY.

**Introduction.**—In order to constitute a tenancy there must be a demise by one person to another of an estate in lands or other hereditaments less than that of the grantor, who retains what is termed the “reversion.” Such a demise is a lease, and the parties to it are respectively lessor and lessee. They are not necessarily landlord and tenant properly so called, for a lease may be of incorporeal hereditaments only, such as a right of way or an advowson. The present article is therefore almost exclusively concerned with leases which include corporeal hereditaments, such as lands or houses. It is essential to a lease that the lessor should not grant the whole of his interest, for this would be an assignment, and that the lessee should take some estate, as

distinguished from a mere licence to use the demised premises. The accepted test of this distinction is to inquire whether or not the grantee gets exclusive possession of some defined portion of land, or of a house or room, for some definite period (*Selby v. Greaves*, 1868, L. R. 3 C. P. 594; *Smallwood v. Sheppards*, [1895] 2 Q. B. 627). Such a letting as that of a stall at an exhibition between certain hours of the day, though for several weeks, confers a licence only (*Rendell v. Roman*, 1893, 9 T. L. R. 192). So, too, in many cases, does the letting of lodgings (see LODGER).

Further, the possession must be not only exclusive but of right, and not by virtue of service. The legal position of persons occupying premises belonging to their employers in connection with their contracts of service has been considered in many cases, chiefly under various Franchise Acts. It is sufficient here to state the general rule which they establish. If the occupation is necessary for the better performance of the duties to be discharged by the occupier, or, though not so necessary, is required of him by the employer, it is not an occupation as tenant, and the possession continues to be that of the employer (*Fox v. Dalby*, 1874, L. R. 10 C. P. 285). If, on the other hand, such occupation is merely permitted by the employer by way of remuneration for the services rendered by the occupier, an interest in the property is conferred, and this is a tenancy (*Hughes v. Overseers of Chatham*, 1843, 5 Man. & G. 54).

A demise exists in contemplation of law in many cases where none has actually been made. It may so exist because the lessor has expressly promised to grant one, or because the conduct of the parties is only consistent with a demise of some kind having been made.

*Tenancies for a term of years.*—These can only be created by leases or agreements for leases. At common law a tenant who entered under such an agreement was a tenant-at-will until he had paid some portion of a yearly rent, after which he was considered a tenant from year to year during the term of the contemplated lease, and subject to such of its provisions as were applicable to a yearly tenancy (*Chapman v. Turner*, 1840, 6 Mee. & W. 100). The Courts of Chancery, on the other hand, if the agreement were one of which specific performance would be decreed, regarded him as in the same position, for all the purposes of the tenancy, as if the lease had actually been granted. And this rule, which is founded on the maxim of equity which considers that what ought to have been done has been done, has, since the Judicature Act, 1873, prevailed (see ss. 24, 89, 91). There are therefore no longer two estates, one at equity under the agreement, and another at common law implied from entry and payment of rent; but the rights of both parties to the agreement are regulated by the provisions of the lease which ought to be granted, from the time of entry in ordinary cases, or from any subsequent time at which the parties may have provided, as in a building agreement, that it should be executed (*Walsh v. Lonsdale*, 1882, 21 Ch. D. 9; *Lowther v. Heaver*, 1889, 41 Ch. D. 248).

In inferior Courts, however, effect can only be given to this rule if they have equitable jurisdiction and, where it is set up by a plaintiff at any rate, in so far as they are competent to grant equitable relief. Where, for instance, a tenant had entered upon premises of a value exceeding £500 under an agreement for a term, and left, after giving notice to quit, before its expiration, it was held in an action for rent that the judge of a County Court, being without jurisdiction to order specific performance, must treat the tenancy as one from year to year; for otherwise he would

be called upon to decide, as the basis of his judgment, what order a superior Court would make upon a claim which he could not directly entertain (*Foster v. Reeves*, [1892] 2 Q. B. 255). The 89th section of the Judicature Act, 1873, is not noticed in the judgments; it does not, however, appear to be inconsistent with the above decision, though its interpretation is not perhaps free from doubt.

But the express provisions which it and sec. 90 contain in favour of a defendant clearly entitle him to use, as a shield, a defence and counter-claim involving matters beyond the jurisdiction of the inferior Court; and there seems no reason for confining these to money claims (see *Davis v. Flagstaff Co.*, 1878, 3 C. P. D. 228). He can at all events obtain the removal of the action into a superior Court (see also Judicature Act, 1884, s. 18, and County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 68).

The duty which is thus imposed upon the judge of a County Court to decide the matter in controversy for the purposes of the defence, although it involves travelling outside the causes of action over which he has jurisdiction, would seem to detract from the weight of the reasoning upon which the decision in *Foster v. Reeves* is founded. As the law stands, however, the endeavour of the Judicature Act to secure uniform recognition of legal and equitable estates in every Court appears to have been practically attained, except in cases where a plaintiff wrongly chooses his *forum* by resorting to an inferior Court.

The principles upon which specific performance is granted will be treated under its own head (see SPECIFIC PERFORMANCE). In the absence of a valid claim to this relief, the only tenancy resulting from entry under an agreement will be a tenancy at will until payment of rent, and, subsequently to such payment, one from year to year (*Coatsworth v. Johnson*, 1886, 55 L. J. Q. B. 220). In the above case the tenant was held not entitled to specific performance by reason of his breaches of the provisions of the agreement as to the cultivation of his farm.

The distinction, therefore, between a lease and an agreement for a lease, though less important than before the Judicature Act, is nevertheless still of consequence, especially as the rule of equity, even where it makes them equivalent as between the parties, does not affect third persons in the same way.

And before entry a lessee has important rights which a mere agreement does not confer. By the execution of the lease an *interesse termini* (see INTERESSE TERMINI), or interest in the term, is vested in him, and he obtains proprietary rights which may be asserted against all the world, unlike those which arise merely from contract. Thus he may bring an action for recovery of possession against anyone who prevents his entry upon the demised premises; and although he is unable to maintain an action of trespass, through want of possession, he may recover damages (by what under the old pleadings would have been an action on the case) against a neighbouring owner whose unlawful or negligent acts, done on his own land, have caused injury to such premises (*Gillard v. Cheshire Lines Committee*, 1884, 32 W. R. 943; *Wallis v. Hands*, [1893] 2 Ch. 75). So too, in the construction of an instrument or interpretation of a statute, it might well be that the word "lease" would not include an agreement for a lease. An instance has recently occurred in the interpretation of sec. 14 of the Conveyancing Act, 1881; and by an amending Act (55 & 56 Vict. c. 13) such agreements are now expressly named (*Swain v. Ayres*, 1888, 21 Q. B. D. 289; and see *infra*, under FORFEITURE).

Whether a particular instrument is a lease or an agreement for one is

a question upon which many decisions will be found collected in the text-books. It is sufficient here to state some general rules which they support. The principle has been not to require technical words or forms of demise, but to look rather to the intention manifested by the instrument in question when regarded as a whole. If it appears to have been intended that the premises should be enjoyed by the tenant, and the relation of landlord and tenant be constituted, either immediately or at a future specified day, it will generally be construed as an actual demise, even though it may provide for the subsequent execution of a formal lease (*Curling v. Mills*, 1843, 6 Man. & G. 173; *Chapman v. Towner*, 1840, 6 Mee. & W. 100). The mere use of the word "agree," or the absence of technical words of demise, such as "demise," "grant," or "to farm let," are of little importance (see *Hand v. Hall*, 1877, 2 Ex. D. 355). If, however, the instrument shows a want of finality, as by disclosing a doubt as to the proper party to grant the intended lease, or a knowledge that the person named as lessor had no present power to demise, or if it stipulate for certain expenditure by the tenant as a condition precedent to the granting of a lease, or fail to show an agreement as to material terms—from these or similar indications an intention to make an agreement merely may be inferred. (See the cases collected, *Dav. Prec. Conv.*, 3rd ed., vol. v. part 1, pp. 1-14, and 1 Platt, *Leases*, pp. 562-611.)

*How leases and agreements for leases may be made.*—At common law, while incorporeal hereditaments could only be granted by deed, leases of corporeal hereditaments, short of a lease for life, could be made by parol, except where either party was—like a corporation—under a legal disability to become a party to a lease, or agreement for a lease, otherwise than under its seal. This distinction between leases or agreements originally invalid by law, and those which, though valid at law, can only, by the statutes to be presently considered, be proved by deed or writing, is one of much importance, especially in the large class of cases where the nature of the tenancy depends upon a claim to specific performance. Where there is at law no contract at all, part performance by giving and taking possession will not of itself entitle the parties to specific performance: there must, as it seems, be some further claim to an equity independent of contract, such as that which may arise from expenditure by a tenant on the faith of a promise to grant a lease (*Hunt v. Wimbledon Local Board*, 1878, 4 C. P. D. 48).

*Statutory restrictions.*—By the Statute of Frauds (ss. 1 and 2) the power to make leases by parol is limited to those not exceeding three years from the making, and whereon the rent reserved is two-thirds at least of the improved value of the premises. All other leases, unless in writing signed by the parties, or their agents thereunto lawfully authorised in writing, shall have the force both at law and equity of estates at will only. And by the Law of Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in writing shall be void at law, unless made by deed.

The exception in favour of leases not exceeding three years from the making includes leases to commence *in futuro*, and also those which may be, but are not necessarily, for more than three years (*Ex parte Voisey*, 1882, 21 Ch. D. at p. 458). A demise for less than three years is not taken out of the exception by a promise that the tenant may at the end of the term claim a renewal of his tenancy for more than three years (*Hand v. Hall*, 1877, 2 Ex. D. 355).

But the Courts both of law and equity have so dealt with these enact-

ments that after possession has been given under an inoperative lease, the position of the parties is the same as if the tenant had entered under an agreement for a lease. It was held at law that, although in the first instance the tenancy was only at will, this was converted by payment of rent into one from year to year, upon such of the terms of the void lease as were not inconsistent with such a holding (*Martin v. Smith*, 1874, L. R. 9 Ex. 50). The Courts of Chancery, on the other hand, treating the invalid lease as an agreement to grant a valid one, and considering entry under it an act of part performance which entitled either party to set it up, regarded the parties from the time of such entry as in the same position as if the lease had been valid, provided always there was no further reason for refusing specific performance of it (*Parker v. Taswell*, 1858, 2 De G. & J. 559). And this rule of equity is now the general law, to the same extent, and with the same qualifications, as have already been pointed out in the case of agreements for leases.

As regards the making of these latter instruments, there is but one statutory restriction, that contained in the 4th section of the Statute of Frauds, which enacts that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." This section applies to agreements for letting portions of houses such as flats, or even furnished apartments, where the exclusive enjoyment of specified rooms is stipulated for, as distinguished from a mere agreement for board and lodging (see *LODGER*) without regard to particular rooms (*Wright v. Stavert*, 1860, 2 El. & El. 721). It will be observed that it embraces all agreements, irrespective of their duration, and that the third section of the Real Property Act, 1845, does not affect agreements, but only leases. What is a sufficient "memorandum or note in writing" will be found discussed elsewhere (see *FRAUDS, STATUTE OF*).

As a restriction upon the creation of tenancies this section is not now of much importance, inasmuch as, after possession has once been taken under it, the rights of the parties to a parol agreement depend upon their claims to specific performance, in the same way as if it satisfied the requirements of the section. It is taken out of the statute by the act of part performance, and the special difficulties which arise in the absence of a memorandum in writing are due, not to the statute, but to the necessity of establishing with certainty an agreement of which specific performance is sought. And the tenancy implied at law after payment of rent was the same whether the agreement was valid or invalid by the statute.

*Tenancies from year to year.*—These may be created (1) by lease or agreement for a lease for such a period; (2) by entry and payment of rent under a lease for years void either by law or by statute, or under an agreement—whether valid or invalid—for such a lease, in the absence of a right to specific performance, as already explained; (3) by entry and payment of rent without any actual demise or express agreement; or (4) by holding over after the determination of a lease, whether one for years or otherwise.

The first mode of creation calls for little comment except as regards the statutory restrictions already discussed in dealing with tenancies for years. A lease from year to year, not being necessarily one for more than

three years from the making, may be made by parol, provided the rent reserved is two-thirds at least of the improved value of the premises; but an agreement for such a letting must either be in writing, or be proved by a memorandum in writing, in order to satisfy the Statute of Frauds (s. 4).

Sometimes agreements have been so expressed as to leave it doubtful whether the letting was intended to be from year to year or not. Thus in a recent case no term was specified, but an annual rent, payable quarterly, was reserved, with liberty to either party to determine the tenancy by three months' notice to quit on any day of the year. This was held on appeal to constitute, by necessary implication, a yearly tenancy (*King v. Eversfield*, [1897] 2 Q. B. 475). Sometimes also a clear yearly demise has been followed by a proviso repugnant to the legal incidents of such a tenancy—as, for example, that the tenant shall not be turned out so long as he observes certain conditions. It has been held that this purports to create a lease for life, which by law can only be granted by deed; whether in any case it would be effectual was not decided, but in the absence of a deed it was rejected, and the landlord's right to give the ordinary notice to quit upheld (*Doe v. Browne*, 1807, 8 East, 165; 9 R. R. 397). Nor were the rights of the lessor to specific performance in the Court of Chancery, though discussed on interlocutory motions, ever finally determined. It was thought, however, that this could only be granted if the instrument in question amounted, not to a demise, but to an executory agreement for one (*Browne v. Warner*, 1807, 14 Ves. 156, 409; 9 R. R. 259; see *Cheshire Lines Committee v. Lewis*, 1880, 50 L. J. Q. B. 121, and cases there cited; and cp. *Wood v. Davis*, 1880, 6 L. R. (Ir.) 50).

The other modes of creating a tenancy from year to year have certain features in common. In the first place, where payment of rent is relied upon, the money must have been paid as rent, and not, for instance, as interest on a mortgage debt by an occupier who had never attorned (*Scobie v. Collins*, [1895] 1 Q. B. 375), and paid also with reference to a yearly holding, as part or the whole of an annual rent (see *Braythwaite v. Hitchcock*, 1842, 10 Mee. & W. 494). For this purpose settling it in account, or an express promise to pay a rent certain, are equivalent to actual payment (*Cox v. Bent*, 1828, 5 Bing. 185; *Regnart v. Porter*, 1831, 7 Bing. 451).

In the second place, the receipt of such rent only raises a *prima facie* presumption of a yearly tenancy: it is evidence of a subsisting tenancy, and if none other appear, the presumption is of one from year to year (*Roe v. Prideaux*, 1808, 10 East, 158; 10 R. R. 258). A great disparity between the letting value of the premises and the rent paid is strong evidence in rebuttal, and the whole circumstances of the payment may be inquired into in order to show that such a tenancy ought not to be implied (see *Smith v. Widdlake*, 1877, 3 C. P. D. 10; and 2 Sm. L. C., 10th ed., p. 124, notes to *Clayton v. Blakey*). So in case of a holding-over a landlord may show that he accepted rent under a mistaken belief that the lease was still current (*Doe v. Orago*, 1848, 6 C. B. 90).

In the third place, both a tenant who enters and pays rent under an invalid lease or an executory agreement, and one who holds over after the expiration of a lease for years—in the absence of evidence to the contrary—are presumed to hold upon such of the terms of the intended or expired lease as are not inconsistent with a yearly tenancy. The following are examples of terms which have been held to be consistent:—Stipulations as to the system of cultivation (*Tooker v. Smith*, 1857, 1 H. & N. 732), or the rotation of crops (*Doe v. Amey*, 1840, 12 Ad. & E. 476), or as to away-going

crops (*Boraston v. Green*, 1812, 16 East, 71; 14 R. R. 297), against underletting (*Crawley v. Price*, 1875, L. R. 10 Q. B. 302), for payment of rent in advance (*Lee v. Smith*, 1854, 9 Ex. Rep. 662; *Dougal v. McCarthy*, [1893] 1 Q. B. 736), for its abatement in case of damage by fire (*Bennett v. Ireland*, 1858, El. B. & E. 326), for re-entry in case of non-payment (*Thomas v. Packer*, 1857, 1 H. & N. 669), or of other breach of covenant (*Crawley v. Price*, *supra*), for the determination of the tenancy at any time thereafter on six months' notice (*Bridges v. Potts*, 1864, 17 C. B. N. S. 314); an agreement to paint "in the last year of the term" (*Martin v. Smith*, 1874, L. R. 9 Ex. 50, where the occupation was under a void lease), or to leave in repair (*Pistor v. Cater*, 1842, 9 Mee. & W. 315), or to put, maintain, and deliver up "at the end of the term" in tenantable repair both internally and externally (*Eccl. Commissioners v. Merral*, 1869, L. R. 4 Ex. 162, a case of holding-over after a lease invalid by law—cp. *Johnson v. St. Peter, Hereford*, 1836, 4 Ad. & E. 520), or to leave a sufficient head of game on the estate (*Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403). Moreover, in the case of a tenancy from year to year implied under an agreement or a void lease for a term of years, the provision as to its length will apply, and the implied tenancy will expire without notice upon the date when the intended lease would have expired (*Doe v. Moffatt*, 1850, 15 Q. B. 257).

It is to be observed that in a case of holding-over, the presumption as to the terms of the tenancy may be rebutted by either party (*Oakley v. Monck*, 1866, L. R. 1 Ex. 159); but the fact of the tenant paying an increased rent will not of itself exclude other terms of the expired lease (*Kelly v. Patterson*, 1874, L. R. 9 C. P. 681). And such a tenancy from year to year may be implied from a holding-over by consent of the landlord, without any payment of rent having been made since the expiration of the term (*Dougal v. McCarthy*, *supra*). Possibly this implication is the more easily made if, as in the above case, the expired lease is for one year—so that the implied period is a repetition or renovation of the original one. Other cases of occupation under an implied demise will be referred to hereafter under the head of *Use and occupation*.

*Tenancies for short periods or at will.*—It would be beyond the limits of the present article to discuss specially the modes in which quarterly, monthly, and weekly tenancies may be created. The difficulties which have arisen in interpreting ambiguous agreements are chiefly in respect of the notice to quit requisite in cases of this kind.

Tenancies at will, on the other hand, have some peculiar features. They may be created either expressly or by implication, or by entry under a void lease, or an executory agreement for a lease, for years, before payment of rent and in the absence of a right to specific performance, as already explained. They may be expressly created by any form of demise which fixes no term between the parties except the will, either of both or one of them (*Co. Lit.* 55 a): by a letting, for instance, to hold "at the will and pleasure of the lessor," or "as long as both parties please," or by an attornment whilst the mortgagor "shall be permitted to remain as tenant" (*Doe v. Cow*, 1847, 11 Q. B. 122; *Richardson v. Langridge*, 1811, 4 Taun. 128; 13 R. R. 570; *Scobie v. Collins*, [1895] 1 Q. B. 375). But if a term, whether for years or from year to year, be specified, the nature of the tenancy is not altered by a stipulation that one of the parties may determine it without notice (*In re Threlfall*, 1880, 16 Ch. D. 274). An implied tenancy at will arises where premises are occupied by the express consent of the owner, but without any agreement—express or implied—as to its duration. Familiar instances of this are the occupation of premises pending negotiations for a lease or purchase,



or the lending of a house rent-free by one person to another (see WILL, TENANCY AT).

#### PARTIES.

The constituent parts of a regular lease are technically distinguished as follows:—The parties, recitals, demise, parcels, *habendum* (which declares the commencement and term of letting), *reddendum*, or reservation of rent, covenants, and conditions.

It would be impossible within the limits of this article to deal adequately with the subject of parties. As a general rule, all persons may make or accept leases, and consequently may be parties. There are, however, various restrictions, both statutory and at common law, upon this right; while, on the other hand, there are a variety of Acts of Parliament scattered through the Statute Book under which the power both of making and accepting leases by different classes of persons has been considerably enlarged. On these matters reference should be made to specific articles dealing with those classes of persons, *e.g.* INFANTS; HUSBAND AND WIFE (as to married women); LUNACY; JOINT-TENANCY and TENANTS IN COMMON; LOCAL GOVERNMENT (as to parish and county councils and allotment lands); PRINCIPAL AND AGENT (as to agents); SETTLED LAND (as to tenants for life and other limited owners); POWERS (as to persons acting under powers), etc. It is proposed, however, to offer a few observations in this place as to the leasing powers of mortgagors and mortgagees, of receivers, of executors and administrators, of copyholders and lords of manors, and of corporations other than those of an ecclesiastical nature.

The power of *mortgagors* and *mortgagees* to make leases is now regulated by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which applies to all mortgages made subsequent to that year, and (by agreement in writing between the parties to that effect) also to those of an earlier date. The power, however, may be excluded by an intention to the contrary being expressed in the mortgage deed or otherwise in writing, in which case the matter is still regulated by common law according to the principles to be presently explained. The Act provides (s. 18) that a mortgagor of land while in possession shall, as against every incumbrancer, and a mortgagee while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make of the mortgaged land an agricultural or occupation lease for any term not exceeding twenty-one years, and a building lease for any term not exceeding ninety-nine years. Where the lease is by the mortgagor, he must deliver within a month to the mortgagee, or if there be several mortgagees, to the one first in priority, a counterpart of the lease duly executed by the lessee, who, however, is not to be himself concerned to see that this provision is complied with. The conditions for the validity of these leases are that they take effect in possession within twelve months, that they reserve the best rent which can be reasonably obtained without fine, that they contain a covenant by the lessee for payment of the rent, and a clause of re-entry on non-payment within a time to be specified not exceeding thirty days, and that a counterpart be executed by the lessee and delivered to the lessor. It is further provided that contracts to make or accept leases under this Act may be enforced by or against every person upon whom the lease, if granted, would be binding. Also, that nothing in the Act is to prevent the mortgage deed from conferring on the mortgagor or mortgagee, or both, any further powers of leasing, such powers, if any, being exercisable, in the absence of an intention to the contrary expressed in the mortgage deed, as far as may be as if conferred by



the Act, and with all similar incidents, effects, and consequences; but neither the mortgagor nor mortgagee is enabled by the Act to make a lease for a longer term or on any other conditions than such as could have been granted or imposed by the mortgagor with the concurrence of all the incumbrancers if the Act had not been passed. A lease granted by a mortgagor under this section has been held to be binding on the mortgagee and on all persons claiming under him in precisely the same manner as if he had been a party thereto (*Wilson v. Queen's Club*, [1891] 3 Ch. 522). So the mortgagee, upon giving notice to the tenant of the mortgage, and of his intention to exercise his rights under it, may enforce the obligations of the lease just as if he had joined in it; nor can his right be interfered with by any collateral stipulations between the lessor and lessee (*Municipal Permanent Investment Building Society v. Smith*, 1888, 22 Q. B. D. 70).

Before this Act was passed the power of mortgagors to make leases of mortgaged property was extremely limited. Without the consent of the mortgagee, and in the absence of power given to him by the mortgage deed, he could make no lease of it which could bind the mortgagee, the tenant as against the latter being a mere trespasser (*Keech v. Hall*, 1778, 1 Doug. 21; 1 Smith, *L. C.* 494, 10th ed.). The mortgagee, however, might, if he pleased, adopt the tenant by some act on his part, such as acceptance of rent, amounting to a recognition of a tenancy between them. But in the absence of some act of the kind it is important to notice that no tenancy existed between the lessee and mortgagee, and it resulted that the latter could not obtain rent from the former whether by suing him for it or by distraining upon him (*Rogers v. Humphreys*, 1835, 4 Ad. & E. 299). It is a question of fact in each case whether what may have passed between the lessee and mortgagee amounts to a new tenancy between them (*Underhay v. Read*, 1887, 20 Q. B. D. 209); but it is well settled that a mere notice given by the mortgagee to the tenant, accompanied by a request, not complied with by the latter, for payment of the rent to him, is not sufficient (*Evans v. Elliot*, 1838, 9 Ad. & E. 342). The new tenancy created in the manner already described by the recognition of the tenant by the mortgagee is a yearly tenancy upon all the terms of the holding agreed upon between the tenant and the mortgagor so far as such terms can be applied to a yearly holding (*Doe v. Ongley*, 1850, 10 C. B. 25); and the result of its creation is to put an end to the tenancy between the lessee and the mortgagor (*Corbett v. Plowden*, 1884, 25 Ch. D. 678).

It is thus seen that no lease by a mortgagor is at common law valid as against the mortgagee, and, on the other hand, the mortgagee himself, though in possession, is equally unable to make a lease which would be valid as against the mortgagor, if the latter be prepared at a subsequent period to redeem the mortgage (*Franklinski v. Ball*, 1864, 33 Beav. 560). It was on account of these difficulties that the provisions of the Conveyancing Act, which have already been noticed, were passed; but inasmuch as those provisions, as already seen, do not apply to mortgages made before the year 1882, and as they may be excluded by arrangement between the mortgagor and the mortgagee, it is still necessary to be acquainted with the old law.

*Receivers* appointed by the Court are usually permitted to make leases of terms not exceeding three years without the necessity of an application to the Court (1 Seton, 675, 5th ed.). If they desire to demise for a longer term, however, the sanction of the Court is necessary (2 Dan. Ch. Prac. 1700, 6th ed.), and in strictness the authority and direction of the Court have been said to be required for leasing the property entrusted to them for

any terms, however short (*Morris v. Elme*, 1790, 1 Ves. 139). And as they have no power to transfer the legal estate in such property, leases of it are, when sanctioned by the Court, usually directed to be made by the person in whom such legal estate is vested (2 Dan. Ch. Prac. *ubi supra*). Where a tenant attorns to a receiver, as by payment of rent to him, a tenancy is created between them, under a well-established principle, by estoppel (*Evans v. Mathias*, 1857, 7 El. & Bl. 590; *Jolly v. Arbuthnot*, 1859, 4 De G. & J. 224).

*Executors and administrators* have a limited power of granting leases of property vested in them in right of their office. Where, for instance, a term of years has been made the subject of a specific bequest, an executor who has once given his assent thereto loses his power of leasing the property, the interest in the term vesting at once in the devisee (*Doe v. Guy*, 1802, 3 East, 120; 6 R. R. 563). Executors being in the position of trustees for the beneficial owners, leasing by them has been said to be an act "not regularly within their province" (per Lord St. Leonards, *Keating v. Keating*, 1835, Ll. & G. 133); so that persons who take leases from them are exposed to the danger of being called upon to show, at the risk of having them declared invalid, that the granting of them was for the advantage of the estate (*ibid.*). So a lease has been declared invalid which was granted by an administrator to a person who had notice from the parties beneficially interested that a sale of the property was required by them (*Drohan v. Drohan*, 1809, 1 Ball & B. 185; 12 R. R. 10). Similarly, an option of purchase in a lease from executors has been held invalid, as preventing a sale, while the period mentioned in it is running, to any person other than the lessee (*Oceanic Steam Navigation Co. v. Sutherland*, 1880, 16 Ch. D. 236). There is this distinction between leases by executors and administrators, that the former may be made even before probate is obtained, because the estate vests in the executor immediately upon the death of the testator (*Roe v. Summerset*, 1770, 2 Black. W. 692); while those by the administrator are invalid until he has obtained his letters of administration, which alone constitute his title (1 Wms. *Executors*, 324, 9th ed.). Executors and administrators being joint-tenants, leases by one of them will be valid, whether made in the name of all or not (*Jacomb v. Harwood*, 1751, 2 Ves. Sen. 265). There is no objection to one of several executors accepting a tenancy from his co-executors (*Cowper v. Fletcher*, 1865, 6 B. & S. 464).

The power both of *lords of manors* and of *copyholders* to make leases depends wholly on custom. With regard to the former, a lease departing from the custom of the manor will not be valid as against the successors of the lord (*Doe v. Strickland*, 1842, 2 Q. B. 792). So a custom for a lord to grant leases out of the wastes of the manor without restriction has been held invalid, the effect of upholding such custom being to put an end to all rights of common (*Badger v. Ford*, 1819, 3 Barn. & Ald. 153; 22 R. R. 331); though where sanctioned by custom leases out of such wastes may be granted by the lord (*Lascelles v. Lord Onslow*, 1877, 2 Q. B. D. 433). With regard to the latter, by general custom leases not exceeding one year are good (Com. Dig. "Copyhold," K. 3), and where that term is exceeded the licence of the lord is required. Where a licence for that purpose has been granted, its terms must be strictly complied with, though, of course, the demise is not invalid by reason of its being made to endure for a term less than that covered by the licence (*Goodwin v. Longhurst*, 1596, Cro. (1) 535). Where no licence is obtained, or where a licence having been obtained, its terms

are departed from, the copyholder will incur forfeiture (*Jackman v. Hodgesdon*, 1594, Cro. (1) 351). As in all similar cases, however, such forfeiture may be waived by the lord. Where, for example, he accepts subsequent rent or does some act recognising the tenancy after he has gained knowledge of the accrual of the forfeiture, such act will operate as a waiver (*Doe v. Bousfield*, 1844, 6 Q. B. 492). And a lease in excess of the custom or of the licence, though invalid as against the lord, is always good as between the parties and as against every other person except the actual lord at the time the forfeiture accrues (*Lady Montague's case*, 1613, Cro. (2) 301). Where the estate actually granted does not exceed the period covered by the custom, a mere covenant that the land may be held beyond that period will not cause a forfeiture (*ibid.*). Nor is there any objection to an agreement being made by a copyholder to grant a lease in excess of the custom subject to the licence of the lord being obtained (*Pistor v. Cater*, 1842, 9 Mee. & W. 315). The lord, however, cannot give a licence clogged by a condition that some act should at a subsequent period be performed for its validity; for a licence is only a dispensation of forfeiture, and such condition would consequently be void (*Haddon v. Arrowsmith*, 1596, Cro. (1) 461). The grant or refusal of a licence rests entirely in the discretion of the lord (*R. v. Hale*, 1838, 9 Ad. & E. 339); but once granted, it operates as a confirmation of the copyholder's lease; and consequently, if the copyholder commit a forfeiture after having made a lease with the lord's licence, the latter cannot dispossess the tenant (*Clarke v. Arden*, 1855, 16 C. B. 227). But where a copyholder obtains a licence from the lord to make a lease, such lease will determine with the estate of the lord (1 Ro. Abr. 511 K.). As to powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases, see the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, ss. 9, 56); and as to similar powers of tenants for life, the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 14).

*Corporations* may in general make leases of the property vested in them, such leases, like all their other contracts, requiring for their validity to be sealed with their common seal. Of the two kinds of corporations, lay and ecclesiastical, something has already been said of the leasing powers possessed by the latter (see ECCLESIASTICAL CORPORATIONS). It is proposed to add a few observations here on those of lay corporations. These corporations are of two kinds, known respectively as civil and eleemosynary. At common law the leasing power of all civil corporations is entirely unrestricted (*Co. Litt.* 44 a). Restrictions, however, have been introduced at various times by statute. The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), prevents the council of an incorporated town, in the absence of some Act of Parliament, from leasing any corporate land for a term exceeding thirty-one years, unless the approval of the Treasury be obtained (see *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208). Leases, however, not exceeding that term are permitted, but only on condition that a clear yearly rent reasonable in amount be reserved and payable throughout the term without any fine (see ss. 108, 109). Colleges and universities, again, which are also civil corporations, are prevented by the Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44, amended by 23 & 24 Vict. c. 59), so far as those bodies are concerned to which the Act applies, from granting leases for terms exceeding twenty-one years, and only subject to certain conditions which are laid down in the Act. Nor are leases by any college valid if granted for more years than are limited by its private statutes (13 Eliz. c. 10, s. 4).

With regard to eleemosynary corporations, the trustees of a charity were able apart from statute to grant leases of any length, the only conditions which were necessary to be fulfilled being that such leases should be "reasonable" and of benefit to the charity; and any leases where such conditions were not fulfilled could be invalidated by the Court of Chancery by its general power of interposition in matters of the kind (*A.-G. v. Owen*, 1805, 10 Ves. 555). It has, however, been provided by statute (16 & 17 Vict. c. 137) that the Charity Commissioners shall have power to authorise the letting of charity lands on lease when they consider it beneficial to the charity; and such leases so authorised by them are to have the same validity as if authorised by the express terms of the trust affecting the charity (ss. 21, 26). By 18 & 19 Vict. c. 124, moreover, lands belonging to a charity were vested in an official trustee, and the acting trustees were empowered to grant all such leases of lands vested in him as they would have been able to grant if they had been vested in themselves (ss. 15, 16). This Act also provides that it shall not be lawful for the trustees or persons acting in the administration of any charity to grant, otherwise than by the express authority of Parliament, or of a Court of competent jurisdiction, or according to a scheme legally established, or with the approval of the Commissioners under the Act, any lease of its property (amongst other things) in consideration wholly or in part of any fine or for any term of years exceeding twenty-one years (s. 29). It has been held that a scheme is not legally established within the meaning of this section unless it is a scheme either sanctioned by the Court of Chancery or by those other Courts which under the Act just cited (16 & 17 Vict. c. 137) could sanction schemes (*In re Mason's Orphanage and London and North-Western Ry. Co.*, [1896] 1 Ch. 54, 596). A lease granted for a term longer than the twenty-one years allowed by the above provision, the approval of the Charity Commissioners not having been obtained, is not valid for twenty-one years, but is void altogether (*Bishop of Bangor v. Parry*, [1891] 2 Q. B. 277).

The taking of leases by trustees of charities, it may be mentioned here, must be in accordance with the provisions of the Mortmain Act (51 & 52 Vict. c. 42). See MORTMAIN.

#### PARCELS.

The extent of the premises demised depends upon the words of description used in the parcels of the lease, upon the "general words" which a lease if made subsequently to 1881 is deemed to contain by the Conveyancing Act, upon the implications of law in favour of a lessee, and upon any reservations or exceptions expressed in the lease or implied at law in favour of the lessor. The rules of interpretation applied to words of description are chiefly laid down in cases upon conveyances of sale, and do not specially belong to the law of landlord and tenant. It is sufficient therefore to state very briefly the principles which have been adopted.

The Courts will in all cases endeavour to ascertain the intention of the parties. Parcel or no parcel is a question of fact, and in case of a trial at *nisi prius* should be left to the jury; but the judge in such a case will direct them as to the construction of any instruments necessary for its decision (*Lyle v. Richards*, 1866, L. R. 1 H. L. 222). Evidence is therefore admissible to identify the premises demised, and in cases where the description is ambiguous, of the conditions existing at the time when it was made. But where a particular property is granted in terms entirely applicable, it is not open to the parties to show by extrinsic evidence that something not described ought to be included. Sometimes the

premises are described in general terms with a reference to the occupation of a previous tenant, and difficulties have frequently arisen where such tenant did not in fact occupy the whole of the premises which were *prima facie* included in the general words of description. The question in such cases is how far the restrictive words ought to be rejected by reason of the maxim *falsa demonstratio non nocet*; that is to say, whether they were intended to restrict the extent of the premises granted or were inserted merely by way of identification, and as such are erroneous. The distinction between some cases of this class is a narrow one (cp. *Magee v. Lavell*, 1874, L. R. 9 C. P. 107; and *Martyr v. Lawrence*, 1864, 2 De G., J. & S. 261). Similar cases have also arisen where the acreage of the demised premises has been wrongly stated. The general rule is that where there is a sufficient description, by giving the particular name of the close or otherwise, a "false demonstration" may be rejected, but that if premises are described in general terms, and a particular description be added, the latter controls the former (*Doe v. Galloway*, 1833, 5 Barn. & Adol. at p. 51, per Parke, J.).

To these general observations may be added a reference to the law in two special cases of parcels. Where the lease grants a right of way over an existing road without restricting it to foot-passengers or otherwise, it will be construed with reference to the nature of the road and the purpose for which it is intended to be used (*Cannon v. Villars*, 1878, 8 Ch. D. 415).

Another decision as to the parcels of a demise, which is of interest owing to the growing importance of the law relating to flats, is that recently given in *Carlisle Café Co. v. Muse*, 1897, 67 L. J. Ch. 53. It was there held that a demise of an upper floor of a house includes the outer walls, so far as they are solely appropriate to the rooms let, and that the tenants of another floor under a subsequent lease had therefore no right to affix letters to such part of the outer walls.

*Provisions of the Conveyancing Act, 1881, and implications at law.*—An important change has been introduced by sec. 6 of this Act as regards conveyances subsequent to 1881, but its enactments only apply in so far as a contrary intention is not expressed in the conveyance, and are to have effect subject to its terms and provisions. By the interpretation clause (s. 2 (5)) a conveyance includes a lease. The effect upon leases of the first-named section may be summarised as follows:—A lease of land is to be deemed to include and operate to demise with the land all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof. And if there are houses or other buildings on the land demised, all out-houses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining, etc. (as above), to the land, houses, or buildings demised, are in like manner to pass by the lease.

This section therefore, within the limits already stated, declares in detail what hereditaments, whether corporeal or incorporeal, a lease shall carry with it in addition to the land, or land and houses, which are the express subject of demise. There is as yet but little authority as to what

is a sufficient expression of a contrary intention in the conveyance to exclude its operation (see *Beddington v. Atlee*, 1887, 35 Ch. D. at p. 331; *Broomfield v. Williams*, [1897] 1 Ch. 602). The object of these provisions is to make conveyances shorter and more uniform, and not in any way to affect the rights of parties to a contract for a sale or demise to have the conveyance settled in accordance with such contract (*In re Peck*, [1893] 2 Ch. 315).

In no respect, perhaps, has the Act done more to simplify the law relating to the parcels of a lease than in cases of *severance*; that is to say, where the lessor retains land adjoining that which he demises, and the lessee claims to exercise or enjoy rights of way, or light, or any other easement over the property so retained. Formerly much difficulty was often experienced in cases of this kind where the demise made no express mention of such rights, and the decision depended upon highly technical distinctions between different classes of easements. Thus a demise of premises, without more, was held to create in favour of the lessee, in the first place easements of necessity, *i.e.* those necessary for the lessee's enjoyment of the demised premises (*Polden v. Bastard*, 1865, L. R. 1 Q. B. 156, per Erle, C.J.) in the way in which they were used at the date of the lease (*Gayford v. Moffatt*, 1868, L. R. 4 Ch. 133). Secondly, it was held to convert into easements in favour of the lessee such rights exercised by the lessor before severance over the property retained by him as would, if exercised by a stranger, have been "continuous" and "apparent" easements, according to the classification adopted in the law specially relating to such rights. These privileges were held to be conferred upon a lessee by virtue rather of the relations created by the demise than of any particular phraseology in the instrument; upon the well-known principle that a lessor is not entitled to derogate from his own grant, and is deemed to have intended the lessee to have a reasonable enjoyment of the thing demised (see *Birmingham Banking Co. v. Ross*, 1888, 38 Ch. D. 295; *Aldin v. Latimer Clark & Co.*, [1894] 2 Ch. 437). And upon the same principle the right to use a defined and formed road to part of the demised premises has been held to pass under a lease of a farm "with all appurtenances," although there was at the time of the demise no such right strictly appurtenant to the farm, where the lessor was also owner of the land over which the road passed (*Thomas v. Owen*, 1887, 20 Q. B. D. 225; cp. *Brown v. Alabaster*, 1887, 37 Ch. D. 490). "When two properties are severed, the parties to the severance, both the man who gives and the man who takes, intend that such reasonable incidents shall go with the thing granted as to enable the person who takes it to enjoy it in a proper and substantial way" (*Bayley v. Great Western Ry. Co.*, 1884, 26 Ch. D. 434, per Bowen, L.J., p. 453).

It has recently been decided that an express demise in a lease of "streams" leading to a pond does not as a matter of construction include water percolating into it without any continuous flow; and it was doubted whether, in view of this express and limited grant, the lease could by implication be extended so as to impose upon the lessor an obligation not to diminish the supply of water to such pond (*M'Nab v. Robertson*, [1897] App. Cas. 129).

The rights of a lessee to an easement, under a grant in general words, over land retained by the lessor, are limited in point of time to the duration of the estate which the lessor had in such land at the date of the lease, and are not extended if he subsequently acquire a further interest in it; for general words in a grant must be restricted to that which the grantor had then power to grant. He might, of course, bind himself by purporting to grant, or

professing to be entitled, for a longer period (*Booth v. Alcock*, 1873, L. R. 8 Ch. 663). Such rights are limited also by the actual continuance of the lease, and whenever and in whatever manner it is put an end to, they cease (*Beddington v. Atlee*, *supra*). Where in case of severance, land out of possession reverts to the lessor during the currency of a lease of adjoining lands, the right of the lessee to easements over them, if any, commences from the date of the lessor's possession (*Warner v. McBryde*, 1877, 36 L. T. 360).

*Exceptions.*—By an exception a grantor excludes some portion of what he has already given so that it may not pass but remain in himself, a valid exception having immediate operation (*Cooper v. Stuart*, 1889, 14 App. Cas. 286, per Lord Watson). But if the thing excepted has already been granted in *express* terms, the exception is void as repugnant to the grant; as, for instance, an exception of one acre from a grant of twenty named acres (*Shep. Touch.* 79). So, too, if it would render the grant ineffectual (2 Platt, *Leases*, 37). But from an ordinary demise, as of a farm, a specific portion or a specified amount may be excepted. (As to the right of selection in the latter case, see *Jenkins v. Green*, 1858, 27 Beav. 437.) The most usual exceptions are those of mines and minerals, and of trees or woods.

An exception to be effectual must either be expressed in clear terms, or be made clear by reference to other parts of the demise, and therefore a mere saving clause, reserving liberty to a grantor to get minerals, will not suffice (*Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475). But a valid exception of minerals carries with it the right to work them and to all requisite wayleaves (*Davis v. Treharne*, 1881, 6 App. Cas. 460); and on the other hand involves an obligation upon the lessor to leave sufficient support for the surface (*Proud v. Bates*, 1865, 34 L. J. Ch. 406). The term "minerals" has frequently been the subject of judicial construction. The important decisions will be found cited in *Lord Jersey v. Neath Guardians*, 1889, 22 Q. B. D. 555 (see MINERALS). In *Elwes v. Brigg Gas Co.*, 1886, 33 Ch. D. 562, it was thought that an ancient boat imbedded in the soil, found by the tenant in the course of excavations, was not within an exception of minerals; but it was held that, apart from this, it did not pass under the demise.

An exception of trees is commonly found in formal leases, and takes various forms, under which particular classes of trees have been held respectively to pass. These are rather matters of conveyancing law than of any general interest. It may be stated, as a rule, that the presumption is in favour of timber trees alone being within the exception, and that an exception of "trees" will not, while an exception of "woods" will, be construed to include the soil covered by the trees or woods (*Legh v. Heald*, 1830, 1 Barn. & Adol. 622). An exception of trees, however, carries with it an implied right in the landlord to go upon the demised premises to cut them at all reasonable times (*Hewitt v. Isham*, 1851, 7 Ex. Rep. 77).

*Reservations.*—These were originally distinguished from exceptions as being concerned, not with the thing granted, but with something issuing out of it and newly created, such as rent or services. But in modern times the strict meaning of reservations has been lost sight of, and the matters most considered under this head are rights retained by the landlord over the lands let to the tenant, whether such rights are in the nature of easements or sporting rights (which are *profits à prendre*). According to legal fiction, where there is such a reservation the lessee regrants to the lessor



that which is reserved, and it is therefore requisite that the lease should be executed by the former and, further, that it should be under seal. It has been objected to this theory that in the case of a reservation of an easement there is no dominant tenement to which such a right can be appurtenant, inasmuch as the regrant is to the lessor as owner of the reversion only. And possibly it may be more accurate to regard such reservation as founded upon a covenant by the tenant rather than a regrant; but the validity of this objection has never been expressly decided (*Lord Dynevor v. Tennant*, 1888, 13 App. Cas. 279, per Lord Selborne). If in such a case the reversion becomes vested in the lessee, the consequent merger extinguishes the rights of the lessor under the reservation (*ibid.*).

Rights of sporting will pass to the lessee unless expressly reserved, and such reservation is in legal effect a licence of a *profit à prendre*, whether expressed as a reservation or as a separate grant. Such a reservation must therefore be in a lease under seal, and executed by the tenant in order to be effectual (*Durham Rwy. Co. v. Walker*, 1842, 2 Q. B. 940). A mere stipulation that the tenant is not to destroy but to preserve all game bred on the farm does not amount to a reservation to the landlord (*Coleman v. Bathurst*, 1871, L. R. 6 Q. B. 366).

The right of a landlord to reserve ground game, *i.e.* hares and rabbits, over lands in the occupation of a tenant, is to a large extent taken away by the Ground Game Act, 1880, 43 & 44 Vict. c. 47; for by sec. 3 every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared by the Act shall be void. This section is not retrospective (*Allhusen v. Brooking*, 1884, 26 Ch. D. 559).

*Implied rights of a lessor upon severance.*—In addition to the rights preserved to him by the express exceptions or reservations of the lease, a lessor has under certain circumstances implied rights in respect of property retained by him. These are frequently called implied reservations. It follows from the general rule of law by which a grant is to be construed strictly against the grantor, that it is much more difficult to establish an implied right in favour of a lessor than an implied grant in favour of a lessee. For it is the duty of the lessor to reserve expressly in the lease any rights which he intends to retain over the tenement granted. To this, however, certain exceptions have been established (*Wheeldon v. Burrows*, 1879, 12 Ch. D. 31). In the first place, he retains easements of necessity, but, inasmuch as this right depends upon a fictitious regrant, it is limited by the necessity which created it, and he cannot therefore claim rights which only became necessary after the date of the lease, by reason of the altered conditions of the property retained by him (*Corporation of London v. Riggs*, 1880, 13 Ch. D. 798).

The most familiar instance of such an easement is a way of necessity (*Davies v. Sear*, 1869, L. R. 7 Eq. 427). And probably what have been called mutual and reciprocal easements, such as the joint use of a common drain, constitute another exception (*Wheeldon v. Burrows*, *supra*, per Thesiger, L.J., at p. 59). Somewhat analogous to these is the mutual right to support of adjoining buildings, although the precise ground upon which it is based has been doubted (see *Russell v. Watts*, 1883, 25 Ch. D. at p. 573, per Cotton, L.J.).

Exceptional cases may also arise where the knowledge of the lessee that a portion of the premises which the lease would, as a matter of construction, operate to pass is used or occupied by or let to a third person, makes it clear that such portion was intended by both parties to be excluded



(*Thomas v. Owen*, 1887, 20 Q. B. D. 225; *Doe v. Burt*, 1787, 1 T. R. 701; 1 R. R. 367).

And the rule under consideration is not to be set up in cases where the lease was made and accepted in faith of a mutual understanding to the contrary. Thus it will not justify an interference by the lessee with the access of light to particular windows in a building constructed by the lessor, according to plans mutually agreed upon at the time of the lease, upon land retained by him, in such a way that the windows opened upon the land demised (*Russell v. Watts*, 1885, 10 App. Cas. 590, per Lord Selborne, at p. 596).

The rights *inter se* of tenants of different holdings under the same landlord depend upon the priority of their leases, a later lessee taking subject to all the rights already granted to others. Thus if the owner of a house and land let the land without reserving his rights of light, and afterwards let the house to another tenant, the lessee of the land may obstruct the lights of the house, however ancient (*Wheeldon v. Burrows*, *supra*). In deciding the priority of such leases, an equitable right under a binding contract will, as it seems, be deemed equivalent to an actual lease (see *Beddington v. Atlee*, 1887, 35 Ch. D. 317).

If leases are contemporaneous—that is to say, either simultaneous or forming part and parcel of one transaction—each lessee, in the absence of express stipulation, is bound by, and entitled to, the privileges, in the nature of continuous and apparent easements, exercised or enjoyed by the common owner over or in respect of the respective tenements (*Allen v. Taylor*, 1880, 16 Ch. D. 355; *Barnes v. Loach*, 1879, 4 Q. B. D. 494; *Phillips v. Low*, [1892] 1 Ch. 47; *Rigby v. Bennett*, 1882, 21 Ch. D. 559, per Jessel, M. R.).

A restrictive covenant in a lease does not, as a rule, enure for the benefit of a subsequent lessee of adjoining land under the same landlord (*Master v. Hansard*, 1876, 4 Ch. D. 718); but if some definite right, such as the use of an existing road, is reserved, this may be expressly granted to the lessee, at a subsequent date, of an adjoining tenement (*Thomas v. Owen*, *supra*).

The case of lessees of adjacent sites under a general building scheme is peculiar, and depends upon the equities which arise from the fact that all the leases are regarded as simultaneous, while all the tenants have notice of the general plan of building. Each tenant in such a case has been held to be bound not to obstruct the lights essential to the houses contemplated by the scheme, and upon the determination of any such lease, the property, with its rights and obligations, as it was held and enjoyed by the tenant during his term, reverts to the lessor (*Russell v. Watts*, 1885, 10 App. Cas. 590).

#### THE TERM.

It is essential to the validity of a lease for years that it should either specify, or indicate with sufficient certainty, when the term is to commence, and how long it is to last; and an executory agreement for a lease must, in order to satisfy the Statute of Frauds, sec. 4, be proved by a contract or memorandum in writing, containing both these elements. In a regular lease they are specified in the habendum, that is to say, the clause which commences with the words "to have and to hold."

If there should be a discrepancy as to the term granted between the habendum and the reddendum or other subsequent parts of the lease, the habendum will, according to accepted canons of construction, prevail. But

an exception will be made if it clearly appears, by looking at other parts of the lease, and, if necessary, at the counterpart, that the habendum is in error, and the lease will be construed so as to give effect to the manifest intention of the parties (*Burchell v. Clark*, 1876, 2 C. P. D. 88).

*Commencement.*—The date fixed for the commencement of a lease may be either past, present, or future. If it is past, the actual grant of the premises does not relate back, but operates to create a tenancy, with its consequent liabilities and obligations, from the date of delivery only (*Jervis v. Tomkinson*, 1856, 1 H. & N. 195); the duration of the term, on the other hand, being ascertained by reference to the specified date. If the date specified is present or future, the term commences on the day named, even where it is also the date of the making of the lease, so that the tenant could not have actual possession under it for more than a part of such day (*Sidebotham v. Holland*, [1895] 1 Q. B., per Lindley, L.J., at p. 382). The proper construction of the words "to hold from" a certain day was formerly the subject of many decisions, the tendency of which was in favour of holding the tenancy to begin on the day following that named (see *Ackland v. Lutley*, 1839, 9 Ad. & E. 879; and 4 Kent's *Com.* 95, note (b)).

The question may still be of importance in connection with notices to quit where the days have to be counted, but where a notice is given in time expiring on the anniversary of the commencement of the tenancy, no distinction will be recognised between the expressions "at," "on," or "from" a particular day (*Sidebotham v. Holland*, *supra*, per Lindley, L.J.).

Where the term is to commence at a future date, it is not necessary that this should be certain at the time when the lease is made, so long as there is some provision under which it will become certain before the lease is to take effect in interest or possession. Thus it may be made to depend upon the determination of a life in being, or of an existing lease (in which case it is called a lease "in reversion"), or upon the payment of a sum of money to the landlord, or upon the arbitrament of some third person. In cases where the habendum is silent as to the commencement of the term, or is expressed in an ambiguous or insensible phrase, the tendency has been, where the demise was under seal, to hold the date of delivery, by which it first became operative, to be the date of the commencement of the tenancy. The use of words of demise in the present tense are of themselves a sufficient indication, in the absence of any clear evidence of a contrary intention. So, too, such words as "from henceforth," or "from the making hereof," or "from the 25th of March now last past," when found in the habendum of a lease under seal, are all referable to the date of its delivery, and parol evidence is admissible to show that it was not, in fact, executed until after its apparent date (*Steele v. Mart*, 1825, 4 Barn. & Cress. 272; 28 R. R. 256). And the same result will follow if the date expressed be an unmeaning one, such as an impossible day of a month (Bac. *Abr.* "Leases" (L. 1)); but if only the year is omitted after rightly stating the day of the month, this may apparently be rectified by legal inference (*Boddington v. Robinson*, 1875, L. R. 10 Ex. 270).

If an instrument operative as an actual demise is not under seal, and no date for the commencement of the term is specified, or can be collected from its language, or is proved to have been agreed upon by verbal or other evidence, the tenancy will be presumed to commence upon the date of the instrument (*Doe v. Benjamin*, 1839, 9 Ad. & E. 644; *Sandill v. Franklin*,

1875, L. R. 10 C. P. 377). It is otherwise if the instrument in question is merely an executory agreement for a lease; for, in the first place, such an agreement is, at the least, as consistent with a future as with an immediate commencement of the term; and, in the second place, it is subject to the provisions of the Statute of Frauds, sec. 4, and falls short of a memorandum in writing containing the material elements of the intended lease (*Marshall v. Berridge*, 1881, 19 Ch. D. 233). Such an agreement—in the absence of part performance—is therefore void, both at law and equity. (It was also pointed out in the above case that where an agreement is in itself obscure, a party may, by insisting throughout on one construction, lose his right to specific performance, which could only be granted upon an opposite construction.) But where such an agreement provided for a term of three years, and for possession to be given within one month from its date, it was held that the agreement, regarded as a whole, sufficiently indicated that the term was to commence from the giving of possession, and evidence as to the date of this was admitted (*In re Lander*, [1892] 3 Ch. 41).

It must not be overlooked that a lease, although it purport to grant a term commencing at once, is not operative if it is delivered by the lessor not as a lease, but as an *escrow*; that is, with the mutual intention that it should not take effect until the performance or happening of some condition precedent. It is not essential to make a deed an escrow that it should, after delivery, be given into the custody of a third person, if the grantor retain it himself; nor is it enough that he himself intended its operation to be postponed. A mutual understanding to this effect must be proved, and all the circumstances may be taken into account (*Gudgen v. Besset*, 1856, 6 El. & Bl. 986).

*Duration.*—In considering the decisions under this head, it is necessary to bear in mind certain important distinctions between leases for life or lives and leases for years. A lease for the life of the lessee, or the lives of other persons (commonly called a “lease for lives”), confers an estate of freehold: was void at law, as now by statute (8 & 9 Vict. c. 106, ss. 2, 3) unless made by deed: and, previously to the same statute, lay in livery only and not in grant. A lease for years, on the other hand, passes merely a chattel interest, and, as has been seen above, was valid at law although made by parol. If a lessor by deed grants hereditaments to another simply, and expresses or limits no estate, this will confer an estate for life (*Co. Litt.* 42 a). So, too, if the demise be by A. to B. “for the term of his natural life,” unless subsequent provisions make it clear that the life intended was that of the lessor (*Doe v. Dodd*, 1833, 5 Barn. & Adol. 689). And an informal agreement that a tenant shall have a lease at his old rent when disposed, and shall not be molested after expenditure, was held to intend a lease for life, although specific performance could not in this particular case be granted to that extent, the landlord having himself only a leasehold interest (*Kusel v. Watson*, 1879, 11 Ch. D. 129).

A lease for life is none the less an estate of freehold if it is determinable upon certain contingencies before the life of the lessee: as a lease for life during coverture, or so long as a certain rent is paid, or during good conduct.

Leases for lives, which were at one time largely resorted to, especially by ecclesiastical corporations, have now fallen into disuse, and a very brief notice of their peculiar features will therefore suffice. A lease for the life of a person not existing at its date is void, but if for several lives, of which

one is not in existence, it is good for the then existing lives only (*Doe v. Edwards*, 1836, 1 Mee. & W. 553). A covenant in an assignment of a lease for lives, that it is a good, valid, and subsisting lease for the lives of A., B., and C., and the survivors or survivor of them, does not warrant that all the three lives are still continuing (*Coates v. Collins*, 1871, L. R. 7 Q. B. 144). Among the many objections to leases of this kind, is the difficulty experienced by the lessor in obtaining information of the death of a *cestui que vie*, and the facility with which fraud could be practised on him. To obviate these difficulties, two statutes were passed. By the 19 Car. II. c. 6, in the case of persons for whose lives estates have been granted, seven years' absence shall, in an action for the recovery of the tenements, be presumptive evidence that they are dead; but the reinstatement of the ejected lessee, with damages, in case he should subsequently prove the survival of the *cestui que vie* is provided for. The enactments of 6 Anne, c. 18, are more rigorous, and provide for orders to produce the *cestui que vie* if his concealment is suspected, or to view him if beyond the seas, and declare a lessee who holds over after the dropping of the last life to be a trespasser liable in damages, without any qualification in favour of lessees ignorant of the death.

In the case of leases for years, certainty as to their duration is essential to their validity, though this may be provided either by the express limitations of the lease, or by reference to some collateral act or event which will, with equal certainty, measure its continuance (Bac. Abr. "Leases," L. 3). There is sufficient certainty, for instance, in such demises as these: "for as many years as B. (the lessee) hath in the manor of D.," or, "during the minority of J. S.," but not in a habendum "for as many years as A. shall live," or "as the coverture between B. and C. shall continue." The difficulty in cases of the latter class was obviated in practice by a habendum for a long term of years, subject to determination upon the death of A. or the discoveriture of B. or C. So a letting from year to year, so long as the lessor has power to let the premises, has been held void, as a lease, for uncertainty (*Wood v. Beard*, 1876, 2 Ex. D. 30). But a lease for ten years at the will of the lessor is said to be a good lease for ten years, the last words being void for repugnancy (Bac. Abr. "Leases," L. 3). And the maxim *ut res magis valeat quam pereat* is generally followed in cases of this kind. Thus a lease for years, without saying how many, is good for two years certain, "because for more there is no certainty, and for less there can be no sense in the words" (Bac. Abr. *ibid.*). And where it was agreed that the lessee should pay fluctuating rents up to a day named, and thereafter a fixed rent "till the end of the lease," which was nowhere specified, it was held that the demise was divisible, and valid up to the specified day, while void for uncertainty as to what followed (*Gwynne v. Mainstone*, 1828, 3 Car. & P. 302). As regards leases for a definite term but dependent upon contingencies, it was decided in an old case, where a lease was for twenty-one years, if the lessee so long lived and continued in the lessor's service, that the lease was not determined by the lessor's death before the expiration of the term, because it was the act of God that the lessee could serve no longer (*Wrenford v. Gyles*, 1598, Cro. (1) 643; and see *Doe v. Smith*, 1805, 6 East, note at p. 534).

So where there had been a merger of the term originally created by a lease, and the lessor granted the residue of such term to a new tenant,—neither party supposing that there had been a merger,—it was held that, as the word "term" might stand not only for the interest but for the time, it must be construed in such a case to mean the number of years unexpired of

the original term, so as to give effect to the instrument, which would otherwise be void, and the consideration paid by the lessee lost (*Cottee v. Richardson*, 1851, 7 Ex. Rep. 143).

A letting for five years, with a stipulation for six months' notice ending with some year of the tenancy "after the expiration of three years," creates a tenancy for four years at least (*Gardner v. Ingram*, 1889, 61 L. T. 729).

Terms for years last during the whole anniversary of the day from which they are granted, so that a lease for years "from" the 25th March expires at midnight on the 25th March in the last year (*Ackland v. Lutley*, 1839, 9 Ad. & E. 879); if, however, the term had been expressed to commence "on" the 25th March, it would have expired at midnight on the 24th March (*Sidebotham v. Holland*, *supra*).

Where a lease is for any considerable number of years, a power is frequently reserved to "break" the lease at fixed intervals and upon a definite notice to one or both of the parties. Sometimes the demise is expressed as for the whole term, at others, in the alternative, as, for example, "for seven, fourteen, or twenty-one years." The legal effect of this is the same as if the demise had been for twenty-one years with a corresponding proviso for its interruption. Some cases as to the proper method of giving notice in such leases are considered under the head of NOTICE TO QUIT.

It remains to notice one or two authorities as to the terms created by irregular leases for a year or from year to year. A letting "for a year, and so on from year to year," or "not for one year only, but from year to year," is good for two years at least (*Doe v. Green*, 1839, 9 Ad. & E. 658; *Cannon Brewery v. Nash*, 1898, 77 L. T. 648). But a lease from year to year "so long as both parties please" would only create a term of one year certain (*Bac. Abr.* "Leases," L. 3); while a demise for three years determinable on a six months' notice to quit, "otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," was held to be for three years at the least (*Jones v. Nixon*, 1862, 1 H. & C. 48).

A lease may be void for perpetuity as well as for uncertainty. As Chief Baron Gilbert has said in his treatise on rents, "An affection of perpetuity is sufficient to damn any lease." There is no such thing at law as a lease in perpetuity, although by Act of Parliament interests equivalent to such leases in many respects may be created (*Sevenoaks Rwy. Co. v. L. C. & D. Rwy. Co.*, 1879, 11 Ch. D. at p. 635). It is, however, competent to parties to a lease for years to insert a covenant for perpetual renewal (see *Renewal*, *infra*).

#### COVENANTS.

The next matter to which attention should naturally be directed is that of covenants. As to this portion of the subject, however, a good deal has already been said in the special article devoted to the subject (see COVENANTS IN LEASES). In that article, in addition to general observations on the matter, will be found a discussion upon covenants which are implied in leases in the absence of express covenants to the same effect; on usual covenants, *i.e.* those which, in the absence of stipulation in an agreement, a lease upon specific performance being granted will be decreed to contain; upon covenants running with the land, *i.e.* binding on and enuring to persons not parties to the lease, but claiming under them by assignment; and lastly, upon covenants restricting the mode of enjoyment of demised premises, including under that head those which impose a fetter upon the right of alienation. It is now proposed to treat in a little more detail the

other covenants which are always, or nearly always, found in properly drawn leases or agreements. The covenant to pay rent, however, will be reserved for treatment at a later stage, it being thought most convenient to treat the whole subject of rent in one place. The covenant, moreover, not to commit waste will be dealt with separately under the head of waste (see WASTE). The particular covenants to which attention will be accordingly directed here are, on the part of the landlord, the covenant for quiet enjoyment and the covenant for renewal, and, on the part of the tenant, the covenant to insure and the covenant to repair. Some observations will be offered on each of these covenants in their order.

*Quiet enjoyment.*—The object of the covenant for quiet enjoyment is to provide in favour of the lessee an assurance against any disturbance in consequence of a defective title on the part of the lessor (*Howell v. Richards*, 1809, 11 East, 633; 11 R. R. 287). It does not appear, according to the present state of the law, to be altogether certain whether the implied covenant for quiet enjoyment—the implication, it may be noted, arises from the use of the word “demise” in the instrument of letting—extends to the acts of persons other than those who claim under the lessor. The express covenant, however, which of course displaces the implied one, is almost invariably restricted to the acts either of the lessor or of persons who claim under him. There have been several decisions as to what persons are included in this designation. It is clear that a person who claims not under but against the lessor is not such a person, e.g. a superior landlord (*Kelly v. Rogers*, [1892] 1 Q. B. 910), a party claiming by title paramount (*Woodhouse v. Jenkins*, 1832, 9 Bing. 431), or a person distraining for a tax which the lessor should have paid before letting the premises to the tenant (*Stanley v. Hayes*, 1842, 3 Q. B. 105). But a prior lessee of the demised premises, or a party claiming under a settlement made by the landlord, or the tenant of adjoining premises belonging to the same landlord, do claim through or under the lessor within the covenant (*Rolph v. Crouch*, 1867, L. R. 3 Ex. 44; *Evans v. Vaughan*, 1825, 4 Barn. & Cress. 261; 28 R. R. 250; *Carpenter v. Parker*, 1857, 3 C. B. N. S. 206; *Sanderson v. Mayor of Berwick-on-Tweed*, 1884, 13 Q. B. D. 547). The liability, moreover, of the lessor upon his covenant for quiet enjoyment may extend to acts of disturbance on the part of a superior landlord by the use of apt words. Thus where in an underlease the tenant was protected against interruption on the part of his landlord or “of any other” by his procurement, and in consequence of the underlessor failing to pay rent to the superior landlord the latter re-entered, it was held that the covenant had been broken (*Stevenson v. Powell*, 1613, 1 Bulst. 182). But where the covenant in an underlease protected only from disturbance by the acts or procurement of the lessor or of those claiming under him, and the superior landlord re-entered in consequence of a breach by a tenant of the underlessee of one of the covenants of the head lease, it was held that no breach of the covenant for quiet enjoyment had been committed by the underlessor (*Spencer v. Marriott*, 1823, 1 Barn. & Cress. 457; 25 R. R. 453).

The object of the covenant is further to secure possession to the lessee and protect him from disturbance (*Wallis v. Hands*, [1893] 2 Ch. 75). Hence a person who, not having entered, possesses only that interest known as an *interesse termini* (see INTERESSE TERMINI), cannot avail himself of its protection (*Wallis v. Hands*, *supra*). It has not the effect of a guarantee to the tenant that he may put the premises to any particular purpose; so that where, by restrictive covenants contained in the lease, the tenant was

prevented from using the premises for certain purposes, it was held that the covenant for quiet enjoyment did not operate to permit him to use them for all other purposes (*Dennett v. Atherton*, 1872, L. R. 7 Q. B. 316). Where premises were let with a covenant for quiet enjoyment, and a further covenant to keep them in proper repair and condition, so as to be available for storing cartridges which the tenant was to have undisturbed liberty to store in the premises, and an Act of Parliament was afterwards passed which prevented the continued user of the premises for such purposes, it was held that the lessor was not liable; for the covenant to keep the premises in proper condition only referred to their physical condition, and the grant of liberty to store cartridges did not import a warranty of the legality of so storing them (*Newby v. Sharpe*, 1878, 8 Ch. D. 39).

As regards the particular kinds of acts which may give rise to a breach of the covenant, it is immaterial, as regards those of the landlord himself, whether they are legal or illegal (*Lloyd v. Tomkies*, 1787, 1 T. R. 671); and the same rule applies where the protection is against the acts of a named person (*Nash v. Palmer*, 1816, 5 Mau. & Sel. 374; 17 R. R. 364; *Fowle v. Welsh*, 1822, 1 Barn. & Cress. 29; 25 R. R. 291). But with regard to other persons, their illegal acts are, in the absence of a provision to the contrary, naturally enough not within the protection of the covenant (*Hayes v. Bickerstaff*, 1669, Vaugh. 118; *Jeffryes v. Evans*, 1865, 19 C. B. N. S. 246; *Sanderson v. Mayor of Berwick-on-Tweed*, *supra*). It is not necessary that the title to or the possession of land be affected by the act in question, if its effect be a substantial interference with the ordinary and lawful enjoyment of the tenant; the question whether there has been such interference being always one of fact to be established by evidence (*Sanderson v. Mayor of Berwick-on-Tweed*, *supra*). The covenant will extend to consequences of an act which are necessary or probable in their nature, but not to those which could not reasonably have been foreseen by the persons who entered into the covenant (*Harrison v. Lord Muncaster*, [1891] 2 Q. B. 680). The protection, it has been said, conferred by the covenant on the tenant is one of an ordinary and not of an extraordinary kind. Hence an act which has the effect of making premises unfit for a special mode of enjoyment unknown to the landlord, as distinguished from one which makes them unfit for the purpose to which it was known that they would be put, is no breach of the covenant (*Robinson v. Kilvert*, 1889, 41 Ch. D. 88; *Aldin v. Clark*, [1894] 2 Ch. 437). So, too, where the lessee of rooms in a building knew that it was intended by the lessors to build on the adjoining land, it was held that the interference with his light caused by the erection on such land of a new building was no breach of the covenant for quiet enjoyment, and that his assignee stood in no better position (*Robson v. Palace Chambers Co.*, 1897, 14 T. L. R. 56).

Physical interference with the demised premises is necessary in the case where physical acts are relied upon, and acts which may amount to annoyance committed on adjoining premises (such as noise) will not amount to a breach of the covenant (*Jenkins v. Jackson*, 1888, 40 Ch. D. 71; *Hudson v. Cripps*, [1896] 1 Ch. 265). An act of omission on the part of the landlord may be a breach of the covenant (*Anderson v. Oppenheimer*, 1880, 5 Q. B. D. 602), and so may an interference with the title and possession of the land by legal proceeding (*Dennett v. Atherton*, 1872, L. R. 7 Q. B. 316). Similarly, a notice given to any undertenants of the lessee on the demised premises, directing them not to pay any longer their rent to him, at all events where compliance is made with such notice, is a breach of the covenant (*Edge v. Boileau*, 1885, 16 Q. B. D. 117). The act relied upon



must have been done after the grant of the lease, though whether the authority to do it be given before or after that time is immaterial (*Anderson v. Oppenheimer, supra*).

The amount of damages which can be recovered for breach of the covenant for quiet enjoyment depends upon whether there has or has not been an actual eviction of the tenant. In the latter case only the actual damages sustained can be recovered (*Child v. Stenning*, 1879, 11 Ch. D. 82); while in the former case the value of what has been lost by the eviction can be recovered in full, together with any expenses which may have been necessarily incurred (*Lock v. Furze*, 1866, L. R. 1 C. P. 441), including even the costs incurred in the unsuccessful but reasonable defence of an action brought by the disturber (*Rolph v. Crouch*, 1867, L. R. 3 Ex. 44). In the case where damages may provide an inadequate remedy, application may be made for an injunction, which in a proper case will be granted (*Shaw v. Stenton*, 1858, 2 H. & N. 858).

*Renewal.*—The covenant for renewal is one which is not at all uncommon in leases, especially perhaps those of an ecclesiastical nature. It is proposed, accordingly, to say a few words as to this obligation on the part of the lessor.

In most cases the right to obtain a renewal by the tenant is conditional upon his making an application on the subject to the lessor, or giving him notice of his desire to renew, at a specified period; and in some cases the further condition is imposed of a due observance on the part of the lessee, down to the time of renewal, of the various obligations of the lease. When this is the case it is important to remember that the right of renewal is in every sense a privilege to the lessee, and the result is that the Courts require somewhat strict proof of the performance of the condition. It has been held, for example, that the fact that the breaches of obligation which may have been committed by the tenant are unimportant does not affect the right of the lessor to resist the tenant's demand for renewal, so long as there is an existing right of action in the lessor upon the obligations of the lease at the moment when the tenant gives his notice (*Finch v. Underwood*, 1876, 2 Ch. D. 310); and if the tenant has failed to perform his obligations, the expenditure by him of money in improving the premises will give him no equity to obtain a renewal of the lease (*Job v. Banister*, 1856, 2 Kay & J. 374). Probably the commonest case of breach of covenant depriving the tenant of his right of renewal is that of the covenant to repair; and where a demise contained a clause giving the tenant option to renew on performance of his covenants, and on six months' notice, and the premises were proved to have been out of repair during the whole time the notice was running, it was held that the tenant had clearly forfeited his right (*Bastin v. Bidwell*, 1881, 18 Ch. D. 238). Nor does it make any difference that the lessor may have waived his right to re-enter for breach of covenant by accepting rent from the tenant after he has gained knowledge of the breach which has been committed, for it is held that such waiver does not extend to the condition upon performance alone of which the right to renewal arises (*Finch v. Underwood* and *Bastin v. Bidwell, supra*). So where a lessor covenanted to renew a lease upon the expiration of the term, if not sooner determined by the acts or defaults of the lessee, and the lessee had been guilty of such acts or defaults, though the lessor, being in ignorance of them, had not determined the term, it was held that the right of renewal had been forfeited (*Thompson v. Guyon*, 1831, 5 Sim. 65). In many cases the lessee



is only to obtain the renewal on paying a specified premium or sum of money by way of fine (*Bogg v. Midland Ry. Co.*, 1867, L. R. 4 Eq. 310). Where the lessor undertook to renew a lease at any time before the end of the term, if required by the lessees, and upon their paying a certain premium, it was held that the lessees were under an obligation to give notice—not necessarily a formal notice—of their desire of renewal before the end of the term, but that it was not necessary that they should pay the premium in question before that time (*Nicholson v. Smith*, 1882, 22 Ch. D. 640).

In all cases of this kind it is incumbent upon the lessee to apply for renewal, or to give notice of his desire or intention to renew, within the time specified by the terms of the lease (*Baynham v. Guy's Hospital*, 1796, 3 Ves. 295; 3 R. R. 96); or if no such time be specified, a reasonable time before the expiration of the lease (*Lewis v. Stephenson*, 1898, 67 L. J. Q. B. 296). Where the failure to give the notice or make application is due to his own neglect or want of care, the right of renewal will inevitably be lost (*Rubery v. Jervoise*, 1786, 1 T. R. 229; 1 R. R. 191). It sometimes happens, however, that though the lessee may have been in default, the lessor's conduct may have been such as to confer upon him an equity which will entitle him, in spite of his default, to renewal, these cases being analogous to those in which Courts of equity formerly exercised the right of relieving tenants against the forfeiture of their leases (*Statham v. Trustees of Liverpool Docks*, 1830, 3 Y. & J. 565; *Hunter v. Lord Hope-toun*, 1865, 13 L. T. 130). It has been decided that where the right to renew is given to the tenant on his making an application during the term, the right, upon his death taking place within that time, enures to, and the notice can be given by, his personal representatives (*Hyde v. Skinner*, 1723, 2 P. Wms. 196).

Where a lease contains a covenant of renewal on the same terms, it is obvious that if such a stipulation be interpreted literally a fresh covenant for renewal would be imported into the new lease, or, in other words, the renewal would be perpetual. The tendency, however, of the Courts has always been in the direction of preventing this result (*Tritton v. Foote*, 1789, 2 Bro. C. C. 636; *Eaton v. Lyon*, 1798, 3 Ves. 690; *Moore v. Foley*, 1801, 6 Ves. 232; 5 R. R. 270; *Iggulden v. May*, 1804, 2 N. R. 449; 8 R. R. 623; *Harnett v. Yielding*, 1805, 2 Sch. & Lef. 549; 9 R. R. 98), though, as will be seen presently, by the use of apt words that result may always be attained. "The authorities," says Lord Selborne, L.C., "certainly do impose upon anyone claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted" (*Swinburne v. Milburn*, 1884, 9 App. Cas. 844, at p. 850). Thus a mere undertaking to renew "from time to time" will not entitle the tenant to perpetual renewal (*Brown v. Tighe*, 1834, 2 Cl. & Fin. 396). Where, however, the intention of the parties to provide for such a privilege may fairly be gathered from the language of the lease, this will be sufficient (*Furnival v. Crew*, 1744, 3 Atk. 83; *Copper Mining Co. v. Beach*, 1823, 13 Beav. 478), and of course the covenant for perpetual renewal may be, and sometimes is, expressly and in terms provided for (*City of London v. Mitford*, 1807, 14 Ves. 41; 9 R. R. 234; *Hare v. Burges*, 1857, 4 Kay & J. 45).

The operation of the covenant in question may, and frequently does, result in the liability of the lessor to pay a sum of money, though sometimes the lessee undertakes to bear a portion of the burden (*Charlton v. Driver*, 1820, 2 B. & B. 345). Thus where a lessor, who was himself possessed of an

estate for years, covenanted to renew to his lessee on the same terms, it was held that the obligation lay upon him, on the occasion of each renewal obtained by him, to renew to the lessee; and the fact that he had only obtained the renewal himself on paying a greatly increased rent was held to be immaterial (*Evans v. Walshe*, 1805, 2 Sch. and Lef. 519; *Revell v. Hussey*, 1813, 2 Ball & B. 280; 12 R. R. 87). Similarly, where a lessor whose estate was determinable on the dropping of certain lives entered into a covenant with his lessee "to use his utmost endeavours" to procure a renewal of his lease when such lives dropped, it was held that he was under an obligation to make any reasonable payment required in order that such renewal should be effected (*Simpson v. Clayton*, 1838, 4 Bing. N. C. 758).

A covenant for renewal in a lease void by statute is of course of no effect (*Bunting v. Sargent*, 1879, 13 Ch. D. 330), and if its execution would be a fraud upon a power it is equally unenforceable, *e.g.* where under a power of granting leases in possession at the best rent, a stipulated rent is no longer the best rent at the time when performance is claimed (*Gas Light and Coke Co. v. Towsr*, 1887, 35 Ch. D. 519).

*Insurance.*—A very usual obligation on the part of the tenant is one to insure the premises demised to him against damage or destruction by fire. On the general subject of fire insurance, reference should be made to the special article dealing with this matter (FIRE INSURANCE); and it is proposed here, of course, to deal only with matters which have a direct bearing on the relation of landlord and tenant. In its details the covenant is met with in some variety, *e.g.* the insurance office to be resorted to is sometimes specially designated in the lease, and sometimes left to the choice of the tenant; sometimes the policy has to be taken out in the lessor's name, while in other cases the lessee is entitled to take it out in his own name jointly with that of the lessor. In both these latter cases the lessee commits a breach of his obligation if he effects the policy in his own name alone (*Doe v. Gladwin*, 1845, 6 Q. B. 953; *Penniall v. Harborne*, 1848, 11 Q. B. 368; *Green v. Low*, 1856, 22 Beav. 625). Moreover, the lessee in every case has to insure himself, and if he underlets to a person who undertakes to insure the premises, such an insurance is not an observance of his own obligation (*Logan v. Hall*, 1847, 4 C. B. 598). The effect of the covenant is to make it a breach of the tenant's obligation if he fails to keep the premises insured during any portion of his tenancy (*Doe v. Peck*, 1830, 1 Barn. & Adol. 428), and the question whether any loss or damage has been sustained in consequence of such failure is of course immaterial. The tenant, however, on the true construction of the covenant, is probably allowed a reasonable time after the lease has been executed in which to carry out his obligation. What is a reasonable time is of course a question to be decided by the circumstances of each particular case. If any delay arises, the burden of explaining its existence is always on the tenant (*Doe v. Ulph*, 1849, 13 Q. B. 204), and even a month's delay has been considered sufficient ground for holding the tenant's obligation broken (*Wilson v. Wilson*, 1854, 14 C. B. 616). The same principle applies where the tenant undertakes to renew his policy within a certain period; time, as in all such cases, being of the essence of the contract, and the absence of any loss or damage being here also altogether beside the question (*Doe v. Shewin*, 1811, 3 Camp. 134).

This portion of the subject, however, does not possess quite the same importance now, in consequence of certain modern statutes, as it did

formerly, when, there being a power of re-entry reserved to the lessor on breach of covenant, the lessee frequently forfeited his estate by reason of a neglect to comply rigidly with the requirements of insurance. The power to grant relief to the tenant for non-insurance in proper cases was first given to the Courts by Lord St. Leonards' Act (22 & 23 Vict. c. 35, ss. 4-9), and extended by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, s. 2). Both these statutory enactments, however, are now repealed, the powers given by them being replaced by the larger powers of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 14). This matter will be found dealt with at the end of the present article, when the dissolution of the tenancy by forfeiture comes to be treated.

In many cases the landlord, being unwilling to run the risk of the tenant's performing his contract, takes out also a policy on his own account. When this happens, he will not be compelled to expend the insurance money, which he may receive on the occurrence of a fire, in rebuilding the premises (*Leeds v. Cheetham*, 1827, 1 Sim. 146; 27 R. R. 181), though of course he may expressly bind himself to do so (*Edwards v. West*, 1878, 7 Ch. D. 858). But if the tenant rebuilds in compliance with his covenant, the landlord cannot retain, as against his own insurance office, sums received from them on his policy, for a policy of fire insurance is a contract of indemnity (*Darrell v. Tibbitts*, 1880, 5 Q. B. D. 560). (See FIRE INSURANCE.) Where, however, premises have been burned down or damaged, and especially where there may be reason to suspect that the owner or occupier, or other person who has insured, may have been guilty of fraud or of wilfully setting fire to the premises, insurance offices, "upon the request of any person or persons interested in or entitled unto" the premises, are required, instead of paying over the insurance money to the claimants, to cause it to be expended in reinstating the premises (see *Simpson v. Scottish Union Insurance Co.*, 1863, 1 H. & M. 618). The above provision is contained in the old Metropolitan Building Act (14 Geo. III. c. 78, s. 83, now repealed except as to this and one other section); but for some reason which it does not appear easy to understand, it has been held that this particular section applies outside the metropolis as well as to the metropolis itself (*Ex parte Gorely*, 1864, 4 De G., J. & S. 477). This decision, however, has lately been called in question in the House of Lords, and perhaps can hardly be said to be now binding (see *Westminster Fire Office v. Glasgow Provident Society*, 1888, 13 App. Cas. 699).

*Repairs.*—The last of the special covenants dealt with here is the covenant found in nearly all leases and agreements where the term is of some length, that relating to repairs. It may be necessary to premise that, even in the absence of such a covenant, a certain liability to repair is imposed upon the lessee by reason of an obligation implied in every letting, that he must use the premises demised to him in a tenant-like manner. What this exactly means cannot perhaps be predicated with certainty. The frequency, already adverted to, with which the express covenant is met with is perhaps in itself a sufficient explanation of this circumstance. In tenancies held under instruments of a less formal character, *e.g.* tenancies from year to year, the matter has occasionally come up for discussion, and the result of the decisions may perhaps be described to be that while the tenant is not bound to do substantial repairs or to remedy the deterioration caused by wear and tear, he is bound to make "tenantable" repairs, so as to prevent the decay of the premises (*Ferguson v. Anon.*, 1797, 2 Esp. 590; 5 R. R. 757; *Horsefall v. Mather*, 1815, Holt N. P. C. 7; 17 R. R. 589;

*Auworth v. Johnson*, 1832, 5 Car. & P. 239; *Torriano v. Young*, 1833, 6 Car. & P. 8; *Leach v. Thomas*, 1835, 7 Car. & P. 327).

In some, though in comparatively very few, cases, not only is the tenant under no obligation to repair, but that obligation is directly undertaken by the landlord, though a stipulation on the part of the lessor to do *external* repairs is by no means uncommon (*Green v. Eales*, 1841, 2 Q. B. 225; *Manchester Bonded Warehouse Co. v. Carr*, 1880, 5 C. P. D. 507). Before liability, however, can be enforced upon this covenant against him, it is necessary that notice of any want of repair be given to him (*Makin v. Watkinson*, 1870, L. R. 6 Ex. 25), and mere proof that the landlord had the means of knowing such want of repair is insufficient (*Hugall v. McLean*, 1885, 53 L. T. 94). This doctrine seems to be founded on the improbability of his having proper knowledge of the state of repair, so that it would not perhaps apply in the common case where the lessor's liability extends only to the outside of the demised premises (*Makin v. Watkinson*, *supra*). The undertaking by the lessor, as between himself and his tenant, to repair entails the somewhat curious result that he thereby becomes liable to a third party in the event of such want of repair occasioning injury to him (*Payne v. Rogers*, 1794, 2 Black. H. 349; 3 R. R. 415), because he is then presumed to have sanctioned the nuisance which has produced the injury (*Pretty v. Bickmore*, 1873, L. R. 8 C. P. 401). Nor does it make any difference in such a case that the landlord's obligation to repair may be only implied, as in the case where the premises are let in flats, and the only access thereto is by means of a staircase, the control of which is vested in him (*Miller v. Hancock*, [1893] 2 Q. B. 177). In addition, too, to the case where the landlord is under an express or implied obligation to repair, there are two, and only two, cases in which he can be rendered liable to a third party for an injury of the kind now in question. First, where such person is one as between himself and whom a certain duty on his part exists, and an injury is occasioned to such person in consequence of the premises being in an unsafe condition at the time of the demise (*Todd v. Flight*, 1860, 9 C. B. N. S. 377; *Bowen v. Anderson*, [1894] 1 Q. B. 164; *Lane v. Cox*, [1897] 1 Q. B. 415); and secondly, where the object of the letting is to provide for a certain mode of user of the premises, and the injury is the probable or necessary consequence of such user (*Harris v. James*, 1876, 45 L. J. Q. B. 545). In both these cases, unlike the case where his liability arises from a contractual obligation with the tenant, the ground of his liability is misfeasance.

Where the lessor covenants to repair, he may enter and occupy the premises for a reasonable time in order to discharge his obligation; for from its very existence a licence to that effect and extent will be implied, even where he has entered into an express covenant for quiet enjoyment (*Saner v. Bilton*, 1878, 7 Ch. D. 815). In all other cases it is clearly established that he has no right of entry in order to view the condition of the premises, or (if necessary) to execute repairs (*Stocker v. Planet Building Society*, 1879, 27 W. R. 877). In properly drawn leases, however, where the lessee undertakes to repair, a clause expressly conferring such right of entry upon the lessor is always to be found.

It may be added that in some leases and agreements the lessor, though not undertaking to repair generally (the general burden of repairs being on the lessee), undertakes to put premises into a certain condition of repair for the reception of the tenant, or in some way to contribute to that result, as by providing necessary materials. Difficulty has frequently arisen in deciding whether or not the lessee's liability is dependent upon the performance by the lessor of such undertaking. The lessee's covenant to

repair is often followed by a clause dealing with materials to be provided for the purpose, the present participle being used in setting out the clause. It seems to be a general rule that the question whether the lessor's obligation is a condition precedent depends on whether the participle refers to him or to the lessee. Thus where the lessee covenants to repair, the lessor "finding timber for the purpose," the lessor must provide it, or be willing and ready to do so, before the lessee's liability can arise (*Thomas v. Cadwallader*, 1744, Willes, 496; *Martyn v. Clue*, 1852, 18 Q. B. 661); while a covenant to repair by the lessee "having or taking upon the premises sufficient materials" merely has the effect of a licence to him to take such materials (*Bristol (Dean of) v. Jones*, 1859, 1 El. & El. 484). In other cases the question is one of construction, upon which it is difficult to lay down general rules. A covenant by the tenant to keep premises in repair, the same being first put into repair by the landlord, is obviously a dependent covenant (*Neale v. Ratcliff*, 1850, 15 Q. B. 916); and so is a covenant by him to keep them in repair "from and after" their repair by the lessor (*Slater v. Stone*, 1622, Cro. (2) 645). On the other hand, if the agreement by the tenant to keep in repair and that by the landlord to find the materials be contained in distinct clauses of the lease, the obligations will be independent (*Tucker v. Linger*, 1882, 21 Ch. D. 18). Similarly, it has been held that the covenants to repair generally, and to repair within a stipulated time after notice from the landlord, are also independent covenants (*Doe v. Meux*, 1825, 4 Barn. & Cress. 606; 28 R. R. 426; *Baylis v. Le Gros*, 1858, 4 C. B. N. S. 537). Consequently, where the required notice has been given, proceedings may still be taken to enforce the general covenant; though where those proceedings take the form of an action of ejectment for forfeiture, the provisions of the Conveyancing Act, 1881 (see *infra*), must now be complied with.

The matter now to be dealt with is confined to the case where an express obligation to repair is undertaken by the tenant. Enforcement of a covenant against him is in most cases by reason of mere nonfeasance on his part. It may, however, arise from an act of misfeasance: these cases, though involving for the most part acts of waste (see WASTE), being also considered to entail breaches of the general covenant to keep the demised premises in repair. For example, the covenant is broken by making alterations in the walls of the demised premises, such as opening doors in them (*Doe v. Jackson*, 1817, 2 Stark. N. P. 293; *Borgnis v. Edwards*, 1860, 2 F. & F. 111; *Gange v. Lockwood*, 1860, 2 F. & F. 115), unless the making of such alterations is obviously contemplated by the terms of the lease (*Doe v. Jones*, 1832, 4 Barn. & Adol. 126).

It must be remembered that the covenant to repair, however large its words may be, is not a covenant to give a different thing from that which the tenant took when he entered into it (*Lister v. Lane*, [1893] 2 Q. B. 212), and the amount and quality of the repairs necessary to fulfil it are always relative to the age, class, and condition of the premises at the time of the demise (*Payne v. Haine*, 1847, 16 Mee. & W. 541; *Stanley v. Towgood*, 1836, 3 Bing. N. C. 4). The tenant, as it has been said, is bound only to keep them as nearly as possible in the same condition as when they were demised to him, and for the diminution in value caused by lapse of time or the elements he is not responsible (*Gutteridge v. Munyard*, 1834, 1 Moo. & R. 334, per Tindal, C.J.). Hence if the premises are old at the time of the demise, such repairs need only be done as may be necessary to keep up the premises as old premises (*Harris v. Jones*, 1832, 1 Moo. & R. 178), the tenant being always at liberty to prove by evidence what was the general

state of repair of the premises when he obtained them, in order to show their age and general character (*Burdett v. Withers*, 1837, 7 Ad. & E. 136; *Mantz v. Goring*, 1838, 4 Bing. N. C. 451). The question as to the nature of the tenant's liability under a covenant to repair of a general kind has in recent times been the subject of express decision by the Court of Appeal. Though the obligation in the case referred to was to do "tenantable" repairs, it is thought that the same principles will equally apply where some other general epithet, e.g. "good," "fair," "proper," "sufficient," or even "substantial," is met with in the covenant. The effect of the decision in question is to require such repairs as would make the premises, having regard to their age, character, and locality, reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take them (*Proudfoot v. Hart*, 1890, 25 Q. B. D. 42). The repairs which have to be done under this class of covenant are of two kinds: structural and decorative, the latter including such repairs as painting and papering. With regard to structural repairs, such as walls or floors of a house, the tenant under such covenant must repair them, but not necessarily replace them, so long as the reasonably-minded tenant already referred to would be satisfied with the premises in their altered condition; whilst, with regard to decorative repairs, the tenant, though again liable for them if necessary to satisfy a reasonable incoming tenant, is not otherwise liable for them, unless necessary to prevent the fabric from going into decay (*Proudfoot v. Hart*, *supra*; *Crawford v. Newton*, 1886, 36 W. R. 54). Painting repairs, however, are not uncommonly stipulated for expressly in leases, the tenant often undertaking to paint the interior of the premises within stipulated intervals, e.g. in every seventh year of the term (*Martin v. Smith*, 1874, L. R. 9 Ex. 50), the lessor sometimes undertaking to paint the exterior. In the absence of stipulations as to time, evidence of local custom has been admitted to show within what intervals such painting should be done (*Scales v. Lawrence*, 1860, 2 F. & F. 289). In a covenant to repair and paint demised premises, with all needful reparations and cleansings, and to leave the premises in such repair, reasonable wear and tear excepted, it has been held that the tenant is only bound to cleanse the old paint, and not to repaint except where the paint has been destroyed (*Scales v. Lawrence*, *supra*; *Moxon v. Townshend*, 1887, 3 T. L. R. 392).

In some leases, especially those where the term does not exceed three years, an exception of "fair wear and tear" is often added to the covenant in favour of the tenant. No express decision is known as to the exact effect of this expression upon the tenant's liability; but it is thought that the covenant thus qualified would not make a tenant liable for dilapidations due to a fair and reasonable user of the premises (see *Davies v. Davies*, 1888, 38 Ch. D. 499).

The variety of covenants to repair is of course very extensive. An undertaking to do necessary repairs has been construed to require the premises to be repaired at the beginning of the tenancy (*Truscott v. Diamond Rock Boring Co.*, 1882, 20 Ch. D. 251), and an agreement to put them into habitable repair as equivalent to an undertaking by the tenant to put them into a state of repair superior to that in which he got them (*Belcher v. McIntosh*, 1839, 8 Car. & P. 720). Where the tenant undertakes to keep the demised premises in repair, this would involve the necessity of putting them, if out of repair, into that state of repair which may be demanded by their age, class, or condition (*Payne v. Haine*, 1847, 16 Mee. & W. 541).

Sometimes the tenant, instead of repairing, has the option conferred

upon him of rebuilding the premises (*Evelyn v. Raddish*, 1817, 7 Taun. 411), though of course, where he is under an express covenant to rebuild, he does not discharge it by the mere execution of repairs (*City of London v. Nash*, 1747, 3 Atk. 512). The tenant frequently undertakes specially to repair and keep in repair the drains belonging to the premises demised to him. Such a covenant, however, does not apply to structural alterations in system, but will be confined strictly to repairs (*Huggall v. McKean*, 1885, C. & E. 391). Nor under a covenant to "make, uphold, support, cleanse, and repair" all drains on the demised premises, is the tenant liable for the cost of constructing a new drain (*Lyon v. Greenhow*, 1892, 8 T. L. R. 457).

The covenant on the part of the tenant to repair often results in an obligation which at the time of demise may be entirely unforeseen. It has frequently been decided that where there is an unqualified covenant to repair, and the premises during the tenancy are burnt down or destroyed by some other inevitable calamity, the tenant will be bound to rebuild and restore them at his own expense (*Chesterfield v. Bolton*, 1738, 2 Com. 627; *Pym v. Blackburn*, 1796, 3 Ves. 34; *Bullock v. Dommitt*, 1796, 6 T. R. 650; 3 R. R. 300). Nor is the circumstance of the landlord having taken out a policy on his own account, and been paid by the insurance company in respect of it (see *Insurance, supra*) material (*Leeds v. Cheetham*, 1827, 1 Sim. 146; 27 R. R. 181; *Lofft v. Dennis*, 1859, 1 El. & El. 474). On the principle already adverted to, however, that the tenant is never bound to give new work for old, his liability is measured by the cost of putting the premises into the same state of repair as that in which he received them (*Yates v. Dunster*, 1855, 11 Ex. Rep. 15); though such liability is not necessarily commensurate with the amount specified in the covenant to insure as that in respect of which the policy should be effected (*Digby v. Atkinson*, 1815, 4 Camp. 275; 16 R. R. 792). Such a hardship, however, as is involved in these cases is seldom incurred at the present day, inasmuch as damage by fire is usually made the subject of express exception in the covenant to repair. But such an exception, it may be pointed out, does not have the effect of throwing liability for the rebuilding upon the landlord (*Weigall v. Waters*, 1795, 6 T. R. 488), though of course such liability on the part of the landlord may result by reason of express stipulation (*Loader v. Kemp*, 1826, 2 Car. & P. 375). Where a lessee covenanted to repair, maintain, and keep the inside of demised premises in good and tenantable repair and condition, and to deliver them up at the end of the term, "damage by fire, storm or tempest, or other inevitable accident" excepted, and, in consequence of one of the floors being overloaded by him, the whole of the premises fell, it was held that, this being the direct consequence of the tenant's own act, the case was not within the exception in the covenant to repair (*Manchester Bonded Warehouse Co. v. Carr*, 1880, 5 C. P. D. 507).

Another result of the tenant's covenant to repair which is often unforeseen by him is in relation to fixtures. *Prima facie* a tenant is entitled to remove fixtures, whether put up for the purposes of trade or for ornament and convenience (see *FIXTURES*). But where he has covenanted to yield up the premises in repair, together with all other erections and buildings put up during the term, the removal of trade fixtures is prevented (*Naylor v. Collinge*, 1807, 1 Taun. 19; 9 R. R. 691; *Penry v. Brown*, 1818, 2 Stark. N. P. 403; 20 R. R. 705; *Lord Mansfield v. Blackburne*, 1840, 6 Bing. N. C. 426; *Bidder v. Trinidad Petroleum Co.*, 1868, 17 W. R. 153); though this does not apply to articles in the nature of fixtures which, from



want of a complete annexation, are really chattels (*Naylor v. Collinge, supra*). And it makes no difference, in the absence of an apparent intention to the contrary, if the fixtures have been put up by him, not under a lease which contains the repairing covenant in question, but under an earlier lease (*Thresher v. East London Water Works Co.*, 1824, 2 Barn. & Cress. 608; 26 R. R. 486).

Where a covenant to repair applies only to the "demised buildings," and buildings are added during the tenancy distinct from those the subject of the demise, the covenant to repair will not extend to these (*Cornish v. Cleife*, 1864, 3 H. & C. 446). But where the covenant to repair is in general terms, the principle is well established that it extends to everything which is the subject of the demise, whether erected at the time of the demise or not, and whether mentioned in the instrument of tenancy or not (*Sunderland v. Newton*, 1830, 3 Sim. 450; 30 R. R. 186; *Hudson v. Williams*, 1878, 39 L. T. 632; *Openshaw v. Evans*, 1884, 50 L. T. 156). Nor does it make any difference to the tenant's general liability on the covenant that he may have been evicted from a portion of the demised premises, and in consequence of such eviction have given up possession of the remainder (*Newton v. Allin*, 1841, 1 Q. B. 518; *Morrison v. Chadwick*, 1849, 7 C. B. 266); though where such eviction is by the landlord himself, the tenant might now seek a remedy by counter claim.

Damages.—Something, in conclusion, should be said on the question of damages recoverable upon the breach of repairing covenants. The breach of the ordinary covenant to keep premises in repair is a continuing breach, and therefore an action may be maintained upon it though judgment may have been recovered against the tenant on a previous occasion; but such judgment will of course go in mitigation of damages (*Coward v. Gregory*, 1866, L. R. 2 C. P. 153). So the fact that the lessor may have recovered damages for a breach during the term will not prevent him from bringing an action for a breach at the end of the term (*Henderson v. Thorn*, [1893] 2 Q. B. 164). No remedy is available in the event of a breach of the covenant to repair other than that of an action for damages, except where forfeiture may be enforced—now only subject to the provisions of the Conveyancing Act—in the case where a right of re-entry is given to the lessor. It is well established that specific performance of the undertaking to repair will not in any case be decreed (see cases in Fry, *Spec. Perf.*, 3rd ed., p. 44).

As to damages, there are two cases to be considered, according as the action is brought during the currency of the term or after its termination. Where an action is brought against the tenant *during the term* for failure to keep the premises in repair, the damages recoverable against him are the loss to the reversion (*Mills v. East London Union*, 1872, L. R. 8 C. P. 79), the amount of damages being clearly in an inverse ratio to the amount of time still to elapse between the happening of the breach and the end of the term (*Doe v. Rowlands*, 1841, 9 Car. & P. 734). Sometimes the lessor expressly reserves to himself the right of doing repairs in the event of the lessee failing to do them, a provision which is sometimes necessary in order to save the accrual of a forfeiture; and where he does, he may recover the expenses from the lessee by way of damage (*Joyner v. Weeks*, [1891] 2 Q. B. 31). Nor does it make any difference that the tenant may, before the action has been commenced, have sold his interest in the premises, and that the purchaser has pulled down and rebuilt them (*Colley v. Streeton*, 1823, 2 Barn. & Cress. 273; 26 R. R. 350). This follows the rule met with in the next class of cases to be discussed.



Some qualification of the above proposition is, however, necessary in the case of underleases. In the ordinary case of an underlease, the lessor, as is well known, parts with the whole of his reversion except a few days, so that the injury to him in the event of his lessee's breach of covenant to repair, if measured by the loss to the reversion, would be practically nothing. The expression, "loss to the reversion," however, is here used in a larger sense. In such cases the liability which is imposed upon the lessor by the head lease must not be lost sight of, and the measure of damages, at any rate where knowledge can be imputed to the underlessee that he is holding under an underlease, is the difference in the position of his lessor in consequence of the covenant, instead of being performed, being unperformed (*Conquest v. Ebbetts*, [1896] App. Cas. 490). It follows that in these cases the damages recoverable against an underlessee are the actual cost of repairs, with a rebate for the time which the underlease may still have to run (*ibid.*). When an underlease is made, a stipulation is frequently found requiring from the underlessee a covenant of indemnity as to liability upon the repairing covenants of the head lease. The advantage to the underlessor of this covenant is that upon an action being brought against him by the head lessor, he is in such case, and in such case only, entitled to bring in his underlessee as third party (*Hornby v. Cardwell*, 1881, 8 Q. B. D. 329; *Pontifex v. Foord*, 1884, 12 Q. B. D. 152; *Morgan v. Hardy*, 1886, 17 Q. B. D. 770). In the absence of such indemnity the lessor cannot render the underlessee liable for the costs and expenses to which he may have been put in proceedings brought to recover damages against him by the head lessor (*Penley v. Watts*, 1841, 7 Mee. & W. 601; *Walker v. Hatton*, 1842, 10 Mee. & W. 249). Nor where he has incurred forfeiture through the underlessee's failure to repair can he recover for the loss of his beneficial reversion (*Logan v. Hall*, 1847, 4 C. B. 598).

Where the term has expired, the measure of damages for breach of the lessee's covenant to repair is such sum as would be necessary in order to put the premises into that condition of repair in which he ought to have left them on quitting (*Joyner v. Weeks*, *supra*), with an allowance for depreciation in the value of the premises due to the lapse of time (*Henderson v. Thorn*, [1893] 2 Q. B. 164). The circumstance that the landlord after the expiration of the term may have effected structural changes in the premises (*Inderwick v. Leech*, 1884, 1 T. L. R. 484), or that he may have agreed with a successor of the tenant to do so (*Rawlings v. Morgan*, 1865, 18 C. B. N. S. 776), cannot be taken into account, inasmuch as the landlord's right to damages becomes vested in him immediately on the conclusion of the term, and there is nothing in the above circumstances which affects the relation between him and his lessee (*Joyner v. Weeks*, *supra*). Nor for the same reason is it material that in consequence of an arrangement which the lessor may have made with a third person to succeed to the tenancy he may have sustained little or no loss by the breach of covenant (*ibid.*), or that some part of the repairs which the tenant should do have been rendered in fact superfluous by reason of a change in the character of the demised and surrounding property (*Morgan v. Hardy*, *supra*), or that the lessor may have forfeited his own interest in the premises (*Clow v. Brogden*, 1840, 2 Man. & G. 39; *Davies v. Underwood*, 1857, 2 H. & N. 570). If the effect of the tenant's breach be to deprive the landlord of the user of the premises, and consequently of his power to let them while the repairs are being executed, he will be entitled to recover damages by way of additional compensation for such loss (*Birch v. Clifford*, 1891, 8 T. L. R. 103).

## RENT.

*What it is.*—The word “rent” (in Latin *redditus*) signifies that which is rendered periodically by a tenant of corporeal hereditaments to his landlord in respect of his tenement. Such a rent was in feudal times a rent-service,—as distinguished from a rent-charge or a rent-seck,—and invariably involved some personal service, fealty at the least; and to this origin several of the features which it presents are referable. It is now payable either in money or by the delivery of some agreed chattel or chattels, whether valuable or otherwise, or by rendering manual services to the landlord or at his request, such as team-work, carting coals, shearing sheep, or cleaning a church, or partly in one way and partly in another. But, according to Lord Coke, a lessor cannot have as rent a parcel of the annual profits themselves, such as the vesture or herbage of the land; for rent must be a reservation in the strict sense, and therefore be something newly created and outside the profits which have been granted to the lessee (*Co. Litt.* 142 *a*).

There must be certainty both as to the amount and the time for payment of rent. It is not necessary, however, that the amount should be ascertainable at the time of demise, so long as some criterion is fixed by which it can be determined later. A rent may be perfectly valid although it is an improving rent, or fluctuating according to the price of corn, or the quantity of stone quarried, or the number of looms run in a mill, or the amount of motive-power supplied by the landlord to a factory (*Selby v. Greaves*, 1868, L. R. 3 C. P. 594, per Willes, J.; *Walsh v. Lonsdale*, 1882, 21 Ch. D. 9). It is to this characteristic of rent that the use of the word “farm” in connection with tenements is due; “farm” formerly meaning, like the mediæval Latin *firma*, a fixed yearly payment; a use which still survives in the common formula of demise, “demise, grant, and to farm let” (in Latin *demisi concessi et ad firmam tradidi*).

A right of distress is essential to rent. Under the feudal law default in rendering service entitled the lord to recover the land let to his tenant by a process of seizure in his own court, a right which was taken away by Statute 52 Hen. III.; and the right to distrain chattels only is a remnant of, or in substitution for, the original power of forfeiture. It follows that rent in the strict sense cannot be reserved upon a letting of incorporeal hereditaments, such as advowsons, rights of common or fishing, offices, tithes, easements, or the like (*Co. Litt.* 47 *a*; *Capel v. Buszard*, 1829, 6 Bing. 150; 32 R. R. 359): except where the lease is by the Crown, the royal prerogative entitling the sovereign to distrain on any lands of the lessee. It may be reserved on a letting of the vesture or herbage merely, because in such a case distress might be levied upon the cattle grazing thereon (*Co. Litt. ibid.*). It is perhaps an apparent rather than a real exception to the above rule, that periodical payments reserved by a demise for the whole of the grantor's estate are treated as in the nature of rent, although this at law is an assignment and not a demise, and the grantor has no right of distress because no reversion remains to him (*Baker v. Gostling*, 1834, 1 Bing. N. C. 19). The tenant, therefore, under such a demise, if evicted, would be entitled to set up such eviction in answer to an action upon his covenant to make such payments (see under *Eviction, infra*).

The whole rent of lands let at an entire rent is deemed to issue out of every portion of it, and inasmuch as it cannot issue out of anything but realty, the rent of a furnished house or rooms, according to legal doctrine, issues out of the land exclusively (*Hargrave v. Shewin*, 1826, 6 B. & C. 34; *Farewell v. Dickenson, ibid.* 251).

Rent is a "specialty debt" within the meaning of 32 & 33 Vict. c. 46, and a landlord, therefore, has no preferential claim against the estate of a deceased tenant for rent in arrear at his death (*In re Hastings*, 1877, 6 Ch. D. 610).

*How reserved.*—In formal leases rent is reserved in the *reddendum*, and this is supplemented by an express covenant in the subsequent part of the lease to pay such rent, and, as a rule, by express provisions for re-entry or forfeiture in case of default. Forms of reservation commonly used are: "yielding and paying therefor," or "at or under," the yearly rent of, etc. Upon the execution of the deed a liability to pay the rent reserved is imposed upon the lessee by reason of the estate thereby vested in him; and so long as this estate remains, an action of debt for such rent is maintainable upon the demise itself, and is therefore not defeated by the cancellation of the lease after it becomes due (*Ward (Lord) v. Lumley*, 1860, 5 H. & N. 656).

Rent by a rule of law must be reserved to the reversioner for the time being. There can be no reservation to a stranger during the life of the lessor, nor can rent be reserved after his death to anyone who has not the reversion after him. This rule has been justified by the older authorities on the ground that recompense for the land ought in justice to pass either to the grantor or to the subsequent owner of the reversion, who lose the profits of the land while the tenancy continues. But this explanation seems inadequate in the case of the grantor, who may be assumed not to reserve rent to a stranger without adequate reason, and it seems more probable that it arises from the feudal origin of rent, and the necessity of rendering rent-service to the reversioner. Even a reservation of rent to the heir of a lessor seised in fee would be void unless the lease were only to commence after his death (2 Ro. Ab. 447). The reversion expectant upon a lease will devolve either upon the heir or devisee or the legal personal representatives, according as the lessor is seised in fee or is merely a termor, *i.e.* a tenant for a term of years. Where, however, his death is subsequent to the commencement of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), *i.e.* 1st January 1898, his real estate, in the absence of the right in any person to take it by survivorship, is now to vest, notwithstanding any testamentary disposition, in his executors or administrators as if it were a chattel real (see ss. 1 (1), 24 (2), 25).

Questions under this rule are much discussed by the older writers, but seem seldom to have arisen in modern times. The result of such authorities may be briefly stated as follows:—The rent will determine upon the death of the lessor if it is reserved to himself; or if, being tenant in fee, he reserves it to himself, his executors or assigns, or to himself and either of them, or if, being a termor, to himself and his heirs. But so long as the right successor is named, the inclusion of those who cannot take the reversion is immaterial, so that reservation to the lessor, his heirs, executors, administrators, and assigns would be safe (*Dollen v. Batt*, 1858, 4 C. B. N. S. at p. 768, per Byles, J.). And it is said that the insertion of the words "during the term" would so clearly indicate the intention of the parties that the rent should continue, that the reversioner would be entitled in succession to the lessor, although the limitations of the reservation specified someone else (Gilbert, *Rents*, 61–69). Lord Coke advises, as the safest course, that the rent should be reserved annually during the term without specifying to whom, in which case the law disposes of it as incident to the reversion (*Whitlock's case*, *infra*); and this is a common form in leases at the present date.

It is now enacted by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 10, that the rent reserved by a lease made subsequently to that year shall be annexed to and go with the reversionary estate immediately expectant on the term granted by the lease, and that it may be recovered by the person for the time being entitled, subject to the term, to the income of the land leased. It had already been held that if a tenant for life, with power of leasing, reserved rent to himself, his heirs and assigns, such rent would after his death continue to the remainderman (*Whitlock's case*, 1608, 8 Rep. 69 b; cp. *Yellowly v. Gower*, 1855, 11 Ex. Rep. 274). It is to be observed that it is at least extremely doubtful whether "lease" as used in the above statute includes an agreement for a lease. This has already been considered when treating of the distinction between such instruments and actual leases. Equitable owners of the reversion are, as will be noticed, within the terms of the section cited.

*When to be paid.*—It is a matter of course in the reddendum of a formal lease, or in some clause of a less formal instrument, to reserve a yearly rent, and to specify the dates or days of payment. If the days of payment are specified without stating when the first payment of rent is to be made, it becomes payable on the first of such days to follow the commencement of the tenancy, without regard to the order in which they are given in the reddendum (*Gilb. Rents*, 49); but if such clause merely provides for payment half-yearly or quarterly, the days of payment are to be fixed by reference to the making of the lease, and without regard to the usual quarter-days (*ibid.* 50). If an annual rent is reserved and no time for payment fixed, it is not payable until the end of a year computed from the time of entry (*Coomber v. Howard*, 1845, 1 C. B. 440); but where the agreement was for such a rent to be paid "at the usual time," evidence was admitted to show, from the dealings of the parties at the time of the agreement and subsequently, an understanding that it should be paid at an earlier date (*Gore v. Lloyd*, 1844, 12 Mee. & W. 463). The right of the lessee to put an end to the tenancy by a quarter's notice, or the voluntary payment by him of his rent quarterly instead of yearly for a considerable time, will not of themselves entitle the lessor to claim a yearly rent before the end of the year (*Collett v. Curling*, 1847, 10 Q. B. 785; *Turner v. Allday*, 1836, Tyrw. & G. 819).

Express provisions as to the days for payment of rent contained in the reddendum will, as a rule, be strictly adhered to, even where they do not harmonise with the actual commencement of the lease. Thus where an annual rent was payable quarterly, the first payment to be made on the 25th March following the date of the letting, it was held that only one quarter's rent was payable on that day although the term commenced on the 8th September previous (the date of the agreement of letting), and that the rent for the first quarter could not be recovered until the term had expired (*Hutchins v. Scott*, 1837, 2 Mee. & W. 809).

It frequently happens that the rent reserved is made payable in advance, either throughout the term or at the outset merely, and either as to the whole or a portion merely, as where there is a "dead rent." A reservation of a yearly rent "payable quarterly on the usual quarter-days, and always, if required, in advance," has been construed to mean that it should always be due at the commencement of each quarter, although the landlord would not be entitled to enforce his remedies for non-payment until after demand for payment (*London and Westminster Loan Co. v. L. and N.-W. Rwy. Co.*, [1893] 2 Q. B. 49). But where the rent was "to be paid three months in advance, such advance to be paid on taking possession," it was held that

the first quarter's rent only was so payable (*Holland v. Palser*, 1817, 2 Stark. 161). Rent although due throughout the day fixed for its payment is not in arrear until after midnight (*Dibble v. Bowater*, 1853, 2 El. & Bl. 564).

The time at which rent is payable may, in cases where it is not clearly set forth in the terms of letting, be regulated by the custom of the country or of the particular estate. And it is competent to the parties to vary such terms by binding agreement; but if the landlord alters the days of payment as an indulgence merely, this would not appear to be binding even upon himself for want of consideration (*In re Smith & Hartogs*, 1895, 73 L. T. 221).

*Place of payment.*—In the absence of any express covenant to pay rent, or of the mention of any particular place in the reservation, the rent is payable on the demised premises. The reason for this is that at common law a landlord was not entitled to re-enter for non-payment of rent until he had formally demanded it upon the premises themselves (*Co. Litt.* 201 b).

But if the lease contains a covenant to pay the rent reserved and is silent as to the place of payment, the tenant must seek out the landlord, if he is within the four seas, in order to discharge his liability under the covenant; although his readiness to pay it on the demised premises would prevent the landlord from re-entering in exercise of his rights at common law (*Haldane v. Johnson*, 1853, 8 Ex. Rep. 689).

*Apportionment.*—There are many cases in which rent accruing due is apportioned: either in respect of estate where, upon a severance of the tenements, the entire rent has to be apportioned to the different parts of the property in question, or in respect of time, where, upon a change of ownership between the specified days of payment, it may be necessary, in order to apportion the rent between the successive owners, or (in some cases) the liability between successive tenants, to regard the rent as accruing *de die in diem*. Apportionment does not, however, affect the time at which the rent is to be paid. The subject has already been treated at length (see article APPORTIONMENT).

*Payment.*—A tenant who pays rent in advance of the proper rent-day runs a risk of being required to pay it over again. As against the landlord or, in case of his death, his legal personal representatives, he is secure, for as the rent becomes due, the previous advance becomes actual payment. But if the landlord should assign his reversion, though only by way of mortgage, either before or after such advance, the assignee will, by giving notice to the tenant before the proper rent-day to pay rent to him, become entitled to the rent then falling due. For the pre-payment is in effect a loan to the landlord to be applied thereafter to discharge the tenant's obligation to pay rent under his lease, but it is not in itself a fulfilment of an obligation which had not arisen at the time of the advance. A notice by the assignee is adequate if, in conjunction with the knowledge otherwise acquired by the tenant, it does in fact bring to his mind that the former is claiming rent as grantee of the reversion (*Nash v. Gray*, 1861, 2 F. & F. 391; *De Nicholls v. Saunders*, 1870, L. R. 5 C. P. 589; *Cook v. Guerra*, 1872, L. R. 7 C. P. 132).

Another risk to which the tenant is exposed is that of the loss of cheques transmitted through the post in payment of rent, which will fall upon him unless the landlord has requested—expressly or impliedly—that they should be so sent. According to a recent decision of the Court of

Appeal, the fact that payments have ordinarily been made in this manner in the course of dealing between two parties is no ground for implying a consent on the part of the payee that they should be so made at his risk (*Pennington v. Crossley*, 1897, 77 L. T. 43). As in the case of other debts, an ordinary cheque is conditional payment, and upon its dishonour the original cause of action revives.

Rent, whether reserved by deed or by parol, if not actually a specialty debt, has all the privileges of that class, and therefore ranks with a judgment debt; but if the landlord takes a bill of exchange after rent becomes due, this, though not of itself a bar to his remedies, is some evidence of an agreement by him to suspend his remedy by distress during its currency (*Palmer v. Bramley*, [1895] 2 Q. B. 405).

A landlord may direct payment of rent to be made to an agent instead of directly to himself. It has been held that where an agent was named as recipient in the lease, the landlord was entitled to revoke such a stipulation by notice to the tenant, in the absence of grounds for holding it to be inserted for the tenant's protection (*Venning v. Bray*, 1862, 2 B. & S. 502). It is provided by the Statute 4 Anne, c. 16, s. 10, that where a landlord grants to another the reversion of land under lease, no tenant shall be prejudiced by payment of rent to the grantor, or by breach of any condition for non-payment of rent, before notice shall be given him of such grant by the grantee. But where a tenant for life, under the erroneous impression that he had forfeited his life estate, acquiesced in the receipt of rents subsequent to the supposed forfeiture by the remainderman, his executor was held not to be estopped from claiming such rents from the tenant who had already so paid them (*Williams v. Bartholomew*, 1798, 1 Bos. & Pul. 326; 4 R. R. 816).

A tenant is entitled to deduct from his rent payments made on behalf of his lessor when they fall under any one of the three following classes: (1) If a landlord expressly undertakes to pay a certain rate or tax imposed upon the tenant and makes default, the tenant upon paying it may, as an alternative to suing him, deduct it from his rent (*Graham v. Tate*, 1813, 1 M. & S. 609). (2) If he pay a "landlord's tax," and by the special statute imposing it is entitled to deduct the amount so paid—in general it is imperative that it should be made from the next instalment due (see *Dawes v. Thomas*, [1892] 1 Q. B. 414). Examples of this are: 5 & 6 Vict. c. 35, s. 60 (property tax); 38 Geo. III. c. 5, s. 17 (land tax); 6 & 7 Will. IV. c. 71, s. 80 (tithe rent-charge); 38 & 39 Vict. c. 55, ss. 104, 214 (Public Health Act). Most of these so-called "landlord's taxes" are not recoverable by the public from the landlord, and in such cases the tenant's only remedy, if left to pay it, is to deduct it from his rent; and he cannot recover it from his landlord except under a special agreement (*Lamb v. Brewster*, 1879, 4 Q. B. D. 607), or special circumstances which prevent such deduction (*Dawson v. Linton*, 1822, 5 Barn. & Ald. 521). (3) Where the tenant is compelled for his protection in the enjoyment of the tenement to make payments which ought, as between them, to have been made by the landlord, such as rent due to a superior landlord (see also *Lodgers Goods Protection Act*, 34 & 35 Vict. c. 79, ss. 1, 3). So too if he pays rent under constraint, such as a threat of legal proceedings, to a mortgagee of the tenement under a mortgage before the lease (*Underhay v. Read*, 1887, 20 Q. B. D. at p. 219, per Fry, L.J.).

*Additional or penal rent.*—In addition to the ordinary rent of the premises, a further rent is frequently reserved in the event of the lessee

committing or failing to do certain specified acts. Familiar instances of this are, in agricultural leases, breaches of good husbandry, or acts which may impair the value of the lands let, such as selling produce or manure off the farm, ploughing up pasture lands, exhausting the soil by successive crops of a particular kind, or the like. In such cases the additional rent payable is generally made proportionate to the extent of the tenant's offending: as to the number of acres ploughed, or of tons of hay or straw sold off the premises. Sometimes a fixed sum is reserved as additional rent if certain covenants should be infringed, such as a covenant not to carry on upon the demised premises any trade or business of a specified description (*Weston v. Metropolitan Asylum District*, 1881, 8 Q. B. D. 387; 9 Q. B. D. 404).

The first question which arises upon such reservations is whether they amount to an agreement that the tenant shall be at liberty to do the acts specified upon payment of the additional rent as compensation, or whether they merely give the lessor an alternative remedy to those which he may otherwise have, by action for damages or forfeiture, in respect of the commission by the tenant of the acts in question. This depends upon the lease read as a whole, and especially upon the covenants by which such reservations are in practice generally followed. If the lessee merely covenants not to do certain things *under* the increased rent, or not to do them, and if he does, to pay the additional rent, there is no prohibition (*Legh v. Lillie*, 1860, 6 H. & N. 165; *Woodward v. Gyles*, 1690, 2 Vern. 119). On the other hand, where a *reddendum*, which reserved an additional rent in case certain trades should be carried on upon the premises demised, was followed by an unqualified covenant by the lessee not to carry on the same, and by a condition for re-entry if either the ordinary or additional rent should be in arrear, or in case of breach of any of the lessee's covenants, it was held that the lessor was entitled to re-enter upon breach of such restrictive covenant, if he elected to exercise that remedy, instead of requiring payment of the additional rent (*Weston v. Metropolitan Asylum District*, *supra*).

The second question, which arises in cases where the additional rent is in respect of matters which are clearly breaches of covenant, is whether it is reserved by way of penalty or as liquidated damages. This is often a matter of much importance, because in the former case the landlord can only recover the amount of damage actually sustained, although by the Statute 8 & 9 Will. III. c. 11, s. 8, he obtains judgment for the full penalty as a security against future breaches. This distinction has been the subject of a great number of reported cases, which disclose considerable difference of opinion as to the principle to be adopted (see *In re Newman*, 1876, 4 Ch. D. 724, per James and Bramwell, L.JJ.; *Wallis v. Smith*, 1882, 21 Ch. D. 243, per Jessel, M. R.); but recent decisions appear to establish the following propositions. The use of the term "penalty" or "liquidated damages" in the lease is not conclusive, but is not to be disregarded, and if the sum made payable is described as a penalty, the onus lies on those who assert that it is payable as liquidated damages (*Willson v. Love*, [1896] 1 Q. B. 626). If the sum payable as additional rent is large, and the title to it may arise upon some trifling breach, as compensation for which it would be clearly extravagant, or upon any one or more of several breaches, some of which may occasion serious and others but trifling damage, or some of which would cause damage substantially less than others, it is to be regarded as a penalty and not as liquidated damages (*Thompson v. Hudson*, 1869, L. R. 4 H. L., per Lord Westbury, at p. 30; *Elphinstone (Lord) v. Monkland Iron Co.*, 1886, 11 App. Cas. 332, per Lord Watson, at p. 342; *Willson v. Love*, *supra*). In the case last mentioned additional rent of £3 per ton "by way



of penalty" was reserved for hay or straw sold off the premises during the last twelve months of the tenancy, and it was proved that the damage caused by selling a ton of hay was a few shillings less than by selling a ton of straw: such difference was held sufficient to make the additional rent *prima facie* a penalty, and this presumption was confirmed by the use of this term in the reddendum itself.

As to double rent which under certain circumstances becomes payable by a tenant, see article DOUBLE RENT AND DOUBLE VALUE.

*Remedies of the landlord.*—(1) *Ordinary remedies.*—Under ordinary circumstances the first remedy exercised by the landlord to recover arrears of rent is that of distress, a subject which has already been treated in the article on DISTRESS. After the goods seized have been sold, he may sue for any balance of rent which still remains due; but so long as he holds the tenant's goods under a distress, an action will not lie (*Lehain v. Philpott*, 1875, L. R. 10 Ex. 242). Sometimes, however, an action for rent is brought in the first instance, in the absence either of a right of distress or of valuable goods upon which to distrain. In cases where the lessor, by what purports to be a lease but is in reality an assignment, grants the whole of his estate in tenements to the lessee, an action is his only means of recovering the so-called rent thereby reserved; because, as has been already pointed out, by parting with the reversion he loses his right either to distrain or to reserve rent in the strict legal sense, though in order to avoid injustice the intended rent is treated as in the nature of rent and not as a sum in gross (*Baker v. Gostling*, 1834, 1 Bing. N. C. 19). And this holds good where such a lease, not being by deed, cannot operate as a valid assignment, provided that it was in the contemplation of the parties to create a tenancy (*Pollock v. Stacy*, 1847, 9 Q. B. 1033).

Interest on rent in arrear is recoverable, from the time when it became due, if reserved by an instrument in writing; otherwise from the time when a demand in writing, giving notice that interest will be claimed, is made upon the tenant. In either case the rate is not to exceed the current rate (3 & 4 Will. IV. c. 42, s. 28).

(2) *Where the tenant's goods have been taken in execution.*—In the event of the tenant's goods being taken in execution by another creditor, a special provision in favour of the landlord is made by Statute 8 Anne, c. 14, s. 1, which forbids the removal of the goods from the premises until the rent due for the same at the time of the taking of such goods shall have been paid by the execution creditor to the landlord. The arrears to which a landlord is thus entitled are limited, in the case of a tenancy for not less than one year, to one year's rent, while by a later statute (7 & 8 Vict. c. 96, s. 67), if a tenement is let at a weekly rent or for any other term less than a year, the landlord's claim or lien upon any goods taken in execution under legal process is limited respectively to four weeks' rent, or to the rent accruing during four such terms.

It is impossible within the limits of this article to deal exhaustively with the numerous points which have been raised under the earlier statute, but the more important decisions are briefly noticed below.

This enactment only applies to a subsisting tenancy, although a subsequent section of the same Act extends the landlord's power of distress for six months after its expiration, and the goods to which it refers are those which are liable to be taken in execution, whether distrainable or not. The landlord's right now under consideration is not therefore entirely commen-



surate with his rights of distress, but inasmuch as the object of the statute was to compensate him for the loss of these by reason of the tenant's goods being in custody of the law, it does not apply where he has not in fact been deprived of the power to distrain: as where a purchaser from the sheriff left the goods on the demised premises for an unreasonable time, so that, being no longer in custody of the law, they were liable to be distrained by the landlord (*In re Benn-Davis*, 1885, 55 L. J. Q. B. 217). But if, after distraining, a landlord relinquishes the distress at a tenant's request, he does not thereby forfeit his claim under the statute. If the execution debtor is a sub-lessee, his immediate lessor only is the "landlord" within its meaning. The rights of the landlord are strictly limited to one year's arrears at the most, and by this is intended the year's rent due immediately before the execution, so that if there should be more than one execution he cannot claim a year's rent out the proceeds of each.

The section under consideration forbids the removal of the goods before payment of the landlord's claim by the execution creditor, and as the latter has nothing to do with such removal, the landlord's remedy is against the sheriff; and so long as none of the goods are removed, even though seized and sold, or if the removal is with the landlord's consent, there is no infringement of the statute. In order to make the sheriff liable, notice of the landlord's claim must be given to him, or it must have otherwise come to his knowledge while the goods or their proceeds are still in his hands (*Andrews v. Dixon*, 1820, 3 Barn. & Ald. 645; 22 R. R. 518; *Arnitt v. Garnett*, 3 Barn. & Ald. 440; 22 R. R. 453). It then becomes the duty of the sheriff to apply to the execution creditor for the sum necessary to satisfy the landlord's claim, and not to proceed with the execution until it is paid. Where it is provided, he is directed by the statute to add the amount to the judgment debt and levy for both. If it is not provided, he may withdraw from possession, but it is a common practice for the sheriff to pay the landlord's claim in the first instance, and reimburse himself out of the proceeds of the levy. This, however, makes him responsible\* to the execution creditor for the validity of the claim for rent, into which he must therefore inquire (*Frost v. Barclay*, 1886, 3 T. L. R. 617). If he sells the goods and allows them to be removed before the rent is paid, he is, under the statute, liable to the landlord for the amount of the arrears which he ought to have received, unless the sheriff can show that this exceeded the value of the goods sold, in which case their value to the landlord at the time of removal is the measure of damage; that they realised a less sum at a forced sale is not enough (*Thomas v. Mirehouse*, 1887, 19 Q. B. D. 563).

If the sheriff should unlawfully seize goods not the property of the tenant upon the demised premises, he will, as it seems, be estopped from denying that he took them under the writ, and therefore that they are subject to the provisions of the statute; and this even where he has restored them to their owner (*Forster v. Cookson*, 1841, 1 Q. B. 419).

The application of the first section of the Statute of Anne to executions under a County Court warrant is expressly excluded by sec. 160 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which contains analogous provisions for a landlord's claim for arrears of rent in such cases.

Special provision has also been made for similar claims where a tenant's goods are taken under process of the Admiralty Division by 24 & 25 Vict. c. 10, s. 16.

(3) *By re-entry*.—This is not a remedy in the same sense as those by distress, action, or under the statutes just considered, for it leads to the

recovery not of the rent but of the tenements. It is treated in a later part of this article under *Forfeiture*.

(4) *Against the executors of a tenant*.—The executor of a deceased tenant may be liable in two capacities—as executor, in which case judgment can only be given against the goods of the testator; or as assignee of the term, in which case judgment is against him personally.

In the first capacity he is liable for all rent which accrued during the life of the testator, and—apart from the statute noticed hereafter—for rent which subsequently falls due, so long as the term lasts. He can only waive the term by offering to surrender it to the lessor, if the premises are of less annual value than the rent, and the assets have been exhausted. An assignment of the term, either by the testator himself or the executor, is no defence to a claim upon an express covenant for rent; but if there is no covenant, then an assignment by either, followed by the acceptance of the assignee as tenant by the landlord, is a good answer to a claim for subsequent rent. In other words, the executor is responsible *de bonis testatoris* for such rent as could have been recovered against the testator had he lived throughout the term, but *plene administravit* is not a good defence if he has used the profits of the tenements for any purpose other than the discharge of the rent, to which by law they ought to be appropriated.

In the second capacity an executor is not liable unless he enters and takes possession of the premises, or does some equivalent act, such as accepting rent from an under-tenant. Payment by an executor of rent falling due after the testator's death is not conclusive evidence that he has taken to the premises. The authorities on this point are fully considered in *Rendall v. Andrew*, 1892, 61 L. J. Q. B. 630, by A. L. Smith, J. If the executor has entered, then the landlord has his election to claim rent which accrues after the tenant's death from him either as executor or as assignee. But this liability as assignee is qualified in the following way. If the testator have himself assigned the term, it is clearly impossible for the executor also to become the assignee; and if the executor assign the term, he is only liable for the period of his own occupation. Moreover, his personal liability for rent seems to be limited to the actual yearly value of the premises. If the rent reserved exceeds the value of the tenements, he is liable as assignee to the extent of such value, and where the value exceeds the rent, to the extent only of such rent. In cases of under-letting he may be responsible for more than the amount which he actually receives, if this is diminished by his own or the testator's laches, such as failure to do repairs, or to eject an insolvent tenant (*Hornidge v. Wilson*, 1840, 11 Ad. & E. 645). The authorities as to this doctrine are reviewed at length in a modern case (*In re Bowes*, 1887, 37 Ch. D. 128). And his liability will be put an end to—as it seems—if he should become entitled to waive the term under the circumstances explained above, and should thereupon offer to surrender to the reversioner (see 2 Wms. *Executors*, 1637 *et seq.*, where the above matters are treated at length).

Important provisions in relief of a tenant's executor are made by the Statute 22 & 23 Vict. c. 35, s. 27. So far as they relate to rent, they entitle him, by assigning his testator's lease or agreement for lease to a purchaser, and after paying to the lessor all rent due down to the date of the assignment, to proceed to distribute the personal estate of his testator without making provision for future liabilities for rent, and discharge him from all personal liability for the future in respect of it. But the rights of the lessor, or of those claiming under him, to follow the

assets of the deceased into the hands of the persons among whom they may have been distributed, are not to be prejudiced. It must not be overlooked that the assignment necessary under this section is to a "purchaser," and an executor therefore will not obtain its protection if he assign the testator's leaseholds to devisees or to trustees for them (*Smith v. Smith*, 1861, 1 Drew. & Sm. 384).

The position of an administrator after the grant of letters of administration is the same, as regards liability for subsequent rent, as that of an executor.

*Cesser or suspension of rent*—(1) *By the determination of the tenancy.*—If the tenancy has come to an end, it is clear that the tenant is no longer liable for rent which would have subsequently become due; though under the Apportionment Acts he may be liable for a rent apportioned from day to day down to its expiration. The various modes of determination will be considered in a subsequent part of this article.

But even a surrender affords no defence to a claim for rent—whether under an express covenant or founded on the demise itself—which had accrued before it was effected (*A.-G. v. Cox*, 1850, 3 H. L. 240; *Shaw v. Lomas*, 1888, 59 L. T. 477). If a lessee surrenders a part of the tenements, he remains liable for an apportioned rent; and the liability of a lessee who has entered into an express covenant to pay rent is at least as great, if a similar surrender is made by his assignee of the term (*Baynton v. Morgan*, 1888, 22 Q. B. D. 74).

(2) *By assignment*—(a) *Of the reversion.*—An absolute assignment by the landlord of the reversion disentitles him to sue for rent accruing after its date; for he thereby ceases to have that to which rent is incident. But an assignment by way of mortgage has not the same effect, for so long as the mortgagee gives no notice of his intention to take possession, or to enter into the receipt of the rents, and profits of the mortgaged tenements, the mortgagor may\* (if sole lessor) sue for such rents or profits (Judicature Act, 1873, s. 25 (5)). Whatever the nature of the assignment, a tenant is protected by a statute already noticed (in treating of the payment of rent)—4 Anne, c. 16—which, after declaring that a grant of the reversion of land under lease shall be effectual without the attornment of the tenant, provides that no tenant shall be prejudiced by payment of rent to the grantor before notice of such grant shall be given to him by the grantee (s. 10). After such notice, the grantee becomes entitled to rent subsequently accruing, as well as to any arrears outstanding at the time of the notice if they have accrued subsequent to the grant (1 Sm. L. C., 10th ed., p. 497, *Moss v. Gallimore*).

A lessor may, without assigning the reversion, grant to another his right to receive the rents of a tenement. Such an assignment conveys an interest in land within the meaning of the Statute of Frauds, sec. 4, and a memorandum in writing containing the material terms, such as the consideration, is essential to its validity (*Ex parte Hall*, 1879, 10 Ch. D. 615). If it is absolute, and not by way of charge only, the assignee may, by giving notice of it in writing to the tenant, perfect his title to recover such rent from him (Judicature Act, 1873, s. 25 (6)). He is not entitled to distrain, not being possessed of the reversion.

(b) *Of the term.*—An assignment of the term passes the whole of the tenant's interest, as distinguished from an underlease which conveys a part only. If the lease contains an express covenant by the lessee to pay rent, his obligation remains unaffected by the assignment, and does not

become a mere guarantee that the assignee will pay it (*Baynton v. Morgan*, 1888, 22 Q. B. D. 74). The lessor, therefore, has his remedy either against lessee, or assignee, or both.

In the absence of such personal covenant, he has his election, either to claim rent from the assignee in virtue of his privity of estate, or from the lessee in virtue of his privity of contract. But if he assents to the assignment, and treats the assignee as his tenant by accepting rent from him or otherwise, he cannot afterwards hold the lessee liable, for privity of contract between them is thereby extinguished (*Mayor of Swansea v. Thomas*, 1882, 10 Q. B. D. 48, 50). Against an underlessee he has no claim for rent.

The subject of assignment is treated more fully hereafter.

(3) *By eviction*.—Eviction of the tenant by the act, either of the lessor or of a stranger claiming by title paramount, entails a suspension of the rent. Eviction must be in respect of that portion of the premises from which alone rent is deemed to issue, that is from the land; so that mere deprivation of an easement over premises not included in the lease is not enough (*Williams v. Hayward*, 1859, 1 El. & El. 1040).

(a) *Eviction by the lessor*.—Such an eviction is not created by a mere trespass: there must be some act of a permanent character done by the lessor, or by his consent and procurement, with the intention of depriving the tenant of the enjoyment of the demised premises, in whole or in part (see *Upton v. Townsend*, 1855, 17 C. B. 30, per Jervis, C.J., at p. 64). In order to entail a suspension of rent, the tenant must have been wrongfully put out of possession, and kept out until the rent in question fell due; but eviction of an underlessee entitles a lessee to the same immunity as the eviction of himself. Letting the premises to another, or receiving rent from a person occupying adversely to the tenant, or even rebuilding a house under lease upon a larger area than before, are all acts which, if done without the tenant's consent, may amount to an eviction (see *Upton v. Greenlees*, 1855, 17 C. B. 30). It is a question of fact, and all the circumstances, including the lessor's intention, are to be regarded (*Newby v. Sharpe*, 1878, 8 Ch. D. 39; *Smith v. Roberts*, 1892, 9 T. L. R. 77, per Lord Esher, M. R.). If the lessee is evicted from a part only of the tenements, this causes a suspension of the whole rent so long as the eviction lasts. The cases of *Upton v. Greenlees* and *Upton v. Townsend* afford extreme instances of this doctrine. In these cases the action was for use and occupation, and there had been no actual occupation since the rebuilding of the tenant's houses. There has been a conflict of opinion, but no satisfactory decision, as to the right of a lessor to recover a *quantum meruit* from a tenant who, after a partial eviction, remains in possession of the residue. The authorities are considered in 1 Wms. *Saund.*, ed. 1871, p. 211. The question is complicated by the fact that in such cases the obligations of the parties under the lease apart from rent remain intact, and therefore in many cases a tenant, in order to fulfil his covenants, is obliged to occupy the residue of the tenements at least temporarily, and thus has not a free choice (see *Morrison v. Chadwick*, 1849, 7 C. B. 266).

There is not in strictness an eviction, if the tenant by the lessor's default never gets possession at all of part of the tenements, as where a portion of the lands has already been let, for a term expiring later than the tenant's lease, to another. It was held in such a case that although the lessee remained in possession of the residue, the whole rent was suspended; the lease, which was not under seal, and therefore incapable of passing an *interesse termini*, being wholly void as to the portion granted by the prior

lease (*Neale v. Mackenzie*, 1836, 1 Mee. & W. 747). But a tenant has been held liable for the whole rent under similar circumstances, where the lease was by deed and effectual to grant to the lessee the reversion and the rent of the portion already demised (*Ecclesiastical Commissioners of Ireland v. O'Connor*, 1858, 9 Ir. C. L. R. 242).

(b) *By title paramount*.—By this is meant eviction by some person who has a title superior to that both of the lessor and lessee, and who enters against the will of the latter. A mortgagee of the premises under a mortgage previous to the lease has such a title, but a mere notice by him to the tenant to pay rent to him does not amount to an eviction, until completed by attornment or actual payment on the part of the lessee (see 1 Sm. L. C., 10th ed., p. 508, notes to *Keech v. Hall*). Evictions of this kind frequently occur in virtue of statutory powers granted to public companies, the lessee's liabilities under his lease to the landlord continuing down to the date of his conveyance to the company (*Mills v. East London Union*, 1872, L. R. 8 C. P. 79).

It is not essential that the tenant should either be expelled or should actually quit possession; if he by attornment or otherwise consent to continue in possession as tenant to the claimant by title paramount, this is deemed equivalent to an eviction followed by a fresh demise (*Hill v. Saunders*, 1824, 4 Barn. & Cress. 529; 28 R. R. 375; *Corbett v. Plowden*, 1884, 25 Ch. D. 678). If the eviction is from the whole of the premises demised, the whole rent is suspended; if from part only, the tenant remains liable for an apportioned rent, whether he is an original lessee or an assignee of the term (*Stevenson v. Lambard*, 1802, 2 East, 575; 6 R. R. 511).

(4) *By destruction of the tenement*.—Accidental destruction of the premises, in whole or in part, without any default on the part of the lessor, does not absolve the tenant from his liability for rent during the residue of the term, even where, in the absence of any express covenant or contract to pay rent, the action is founded on use and occupation, and the tenement consists of an upper floor, so that after its destruction there was nothing to occupy (*Izon v. Gorton*, 1839, 5 Bing. N. C. 501). It does not constitute a good defence upon equitable grounds, nor will a landlord who has received the amount of an insurance effected by himself upon the tenements be restrained from suing for rent until they have been rebuilt by him (*Holtzapffel v. Baker*, 1811, 18 Ves. 115; *Leeds v. Cheetham*, 1827, 1 Sim. 146; 27 R. R. 181).

It is usual therefore to provide in leases that the rent shall cease or abate if the premises should be rendered untenable by fire or other inevitable accident. Such a provision must be made in express terms, and will not, for example, be inferred from a covenant that a tenant shall not be bound to repair in case of damage by fire (see *Weigall v. Waters*, 1795, 6 T. R. 488, per Lord Kenyon, C.J.). And where the stipulation was for the cesser or abatement of the rent in case of destruction or damage by "fire, flood, storm, tempest, or other inevitable accident," it was held that the last words imported something *ejusdem generis* with the accidents specified, and did not include that which, though unavoidable by the lessee, resulted from the act of the lessor (*Sanier v. Bilton*, 1878, 7 Ch. D. 815). Under a provision for rent, "damage by fire excepted," it has been held that upon a partial destruction of the tenement the tenant is only entitled to a proportionate reduction (*Bennett v. Ireland*, 1858, El. B. & E. 326). And if his liability ceases upon the destruction of the premises by fire, he is liable to pay an apportioned rent down to the date of its occurrence (*Packer v. Gibbins*, 1841, 1 Q. B. 421).

(5) *By the Statute of Limitations.*—Rent reserved by a lease under seal is recoverable within twenty years after the cause of action has arisen, or after an acknowledgment by the party liable or his agent, or part payment (3 & 4 Will. iv. c. 42, s. 3). In other cases no action shall be brought to recover arrears of rent but within six years after they shall have become due or after the like acknowledgment (3 & 4 Will. iv. c. 27, s. 42).

The effect of these enactments is to limit the amount of arrears recoverable, but so long as a tenancy is actually subsisting, a landlord does not lose his right to rent by non-payment for however long a period (*Archbold v. Scully*, 1861, 9 H. L. 360, per Lord Cranworth). It is of course open to a tenant if sued for rent to show if he can that the landlord's title has been extinguished by the provisions of these or similar statutes. (See LIMITATIONS, STATUTE OF.)

(6) *Illegality.*—The Courts of law will not enforce payment of rent if the letting, whether by deed or parol, was for an illegal or immoral purpose, in accordance with the rule *ex turpi causâ non oritur actio*. A purpose is illegal if it contravenes any statute, whether public or local, and it is not necessary that it should have been carried into effect (*Gas Light Co. v. Turner*, 1840, 6 Bing. N. C. 324; *Flight v. Clarke*, 1844, 13 Mee. & W. 155). It may be proved by extrinsic evidence even where the demise is by deed (*Gas Light Co. v. Turner*, *supra*, per Lord Abinger, C.B.). If premises are let for an immoral purpose it is not necessary to show that the landlord looked to the proceeds of the immoral acts for payment of the rent: it is sufficient, to disentitle him to recover it, that he was aware of the tenant's intentions, either at the time of letting, or at anyrate before the period in respect of which the rent is claimed (*Pearce v. Brooks*, 1866, L. R. 1 Ex. 213; *Jennings v. Throgmorton*, 1825, Ry. & M. 251; 27 R. R. 746). And it may be assumed that the same amount of knowledge on the part of the landlord is requisite and sufficient where the object is illegal. If such knowledge existed it is immaterial that the immoral use was prohibited by the terms of the lease (*Smith v. White*, 166, L. R. 1 Eq. 626).

*Action for use and occupation.*—Rent is recoverable by action founded either on covenant or on debt, or, if the demise is not under seal, on use and occupation. In theory actions for use and occupation depend upon the contract implied at law, where one person occupies land belonging to another by his permission, that he will pay him a reasonable remuneration for such use. As a matter of history, however, it does not appear to have been introduced to meet such cases, for in all the earliest recorded decisions the action was for a fixed sum, both the time and the rent being certain; while the first instance to the contrary occurs in the reign of George III. A full exposition of the history of this form of action is to be found in the judgment of the Court in *Gibson v. Kirk*, 1841, 1 Q. B. 850. Its importance at the present time depends chiefly upon its application to several causes of action which could not be maintained either as for rent due upon a demise or under a covenant.

For practical purposes this action was newly founded by the Statute 11 Geo. II. c. 19, since, although it existed previously in the form of *indebitatus assumpsit* for use and occupation, the plaintiff was always liable to be nonsuited if an actual demise was put in evidence. It is immaterial therefore to consider whether in other respects it was, as has been said, maintainable before the statute in all cases where it can now be maintained (see *Churchward v. Ford*, 1857, 2 H. & N. 446, per Bramwell, B.). The statute, after referring to the difficulties experienced in recovering rents

where the demise was not by deed, provides (s. 14) that it shall be lawful for the landlord, "where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant, in an action . . . for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear," the plaintiff shall not be nonsuited, but may make use thereof as evidence of the *quantum* of the damages to be recovered.

It has been held that a demise by deed delivered as an escrow or not executed by the lessor does not exclude such an action. The more important terms of this section are considered in their order.

"A reasonable satisfaction."—The amount of this is by the subsequent part of the section to be regulated by any demise or agreement (not being by deed) reserving a fixed rent, and such an agreement is admissible although it fails to comply with the Statute of Frauds (*Smallwood v. Sheppards*, [1895] 2 Q. B. 627). The tenant, however, is entitled to show that the landlord has not performed on his part some condition precedent to his right to the agreed rent, or that he himself has not had the full enjoyment contemplated owing to a partial eviction by title paramount. In such cases, or in the absence of agreement for a certain rent, the tenant is only liable for the reasonable value of such occupation as he has in fact enjoyed. And where there was a stipulation, in a letting of a theatre for three weeks, that one-half of the agreed rent should be paid in advance, and the lessor evicted the tenant for non-payment thereof after he had been in possession for three days only, he recovered merely a nominal sum (*Mayer v. Southey*, 1892, 8 T. L. R. 395). As soon as the occupation ceases, the implied contract to pay compensation ceases, and where no express time for payment is limited it is deemed to accrue from day to day (*Gibson v. Kirk*, *supra*). But a landlord cannot take advantage of this doctrine where the time for payment of rent is fixed, so as to recover it before the rent-day by an action for use and occupation (*Collett v. Curling*, 1847, 10 Q. B. 785). So, too, if the tenancy is determined by consent between rent-days, the apportioned rent is not payable until the entire portion would have become due (see 33 & 34 Vict. c. 35, s. 3, and under APPORTIONMENT).

"Lands, tenements, and hereditaments held or occupied."—Incorporeal hereditaments, such as rights of fishing or shooting, or of taking minerals, or tithes or tolls, are included as well as lands and houses. And either holding or occupation is sufficient. Entry is requisite; for one who has merely an *interesse termini* is not liable in this action. But executors are liable in their representative capacity, if their testator had entered, unless they give up possession, even if they have never occupied. And entry by one of several joint-tenants is equivalent to entry by all.

If a tenant who has once entered ceases to occupy, either because of the destruction of the premises by fire, or from any cause for which the landlord is not responsible, he nevertheless "holds" until the tenancy is determined (*Izon v. Gorton*, 1839, 5 Bing. N. C. 501).

It is not necessary that the tenant should occupy in his own person; it is sufficient if he occupies constructively, as by his agent or sub-tenant. But in any case he must, either by himself or another, enter intending to occupy as tenant; and temporary occupation for a special purpose, as by the assignees of an insolvent tenant for the purpose of selling his goods, or the retention inadvertently of the key of the premises by the tenant for a short time after quitting, do not give a cause of action under the statute.



(*How v. Kennett*, 1835, 3 Ad. & E. 659; *Gray v. Bompas*, 1862, 11 C. B. N. S. 520). Such acts of ownership as advertising the tenements as to let, or re-papering a room, have been held, on the other hand, to establish such an intention, which is always a question of fact (*Sullivan v. Jones*, 1829, 3 Car. & P. 579; *Smith v. Twoart*, 1841, 2 Man. & G. 841).

Further, the occupation must be by permission of the landlord, and not adversely to him, or that of a trespasser. It is of course open to the tenant to show that it was understood or agreed that he should occupy rent-free (*Crouch v. Tregonning*, 1872, L. R. 7 Ex. 88, per Bramwell, B.). But in the absence of evidence in refutation, a contract to pay reasonable remuneration will, as a rule, be implied from occupation by one person of the lands or hereditaments of another by his permission; though mere assent to a letting to an occupier by someone else is not permission in this sense (*Churchward v. Ford*, 1857, 2 H. & N. 446; *Phillips v. Homfray*, 1883, 24 Ch. D. at p. 461, per Bowen, L.J.). The assignee, however, of the reversion from the person who gave the permission may recover for use and occupation; but where the claim is founded upon a contract to be implied from occupation, it has been thought that it must be strictly limited to occupation since that date (see *Mortimer v. Preedy*, 1838, 3 Mee. & W. 602). And where a tenant held over after the expiration of his term without the landlord's consent and thereby became a tenant at sufferance, it was held that the landlord's abstention from proceedings in ejectment against him amounted to permission for the purposes of the action under consideration (see *Bayley v. Bradley*, 1848, 5 C. B. 396).

The principles above explained are exemplified by numerous cases where an intending purchaser or lessee has been let into possession pending the completion of the conveyance or lease, without any agreement as to payment during the interval in such a contingency. Where the purchase went off because the vendor could not make a good title, the latter failed to recover for the period of occupation by the intending purchaser, against whom an undertaking to pay compensation in such an event could not under the circumstances be inferred (*Winterbottom v. Ingham*, 1845, 7 Q. B. 611). And the same rule applies where possession is given under an agreement for a lease which the landlord eventually fails to grant, but not if the matter falls through owing to the default of the proposed tenant (*Rumball v. Wright*, 1824, 1 Car. & P. 589). In the former case there must be an agreement and not merely an expectation that the parties will come to terms (*Coygan v. Warwick*, 1852, 3 Car. & Kir. 40).

In the same way continuance in possession after a contract for purchase has been broken off, or an intended sub-lease restrained by an injunction granted to the superior landlord, entitles the owner in the one case, and the lessee in the other, to compensation for the subsequent possession, if beneficial (*Howard v. Shaw*, 1841, 8 Mee. & W. 118; *Fawkner v. Booth*, 1893, 10 T. L. R. 83).

An action for use and occupation is clearly inappropriate against a vendor who fails to deliver up possession after conveyance to a purchaser; though under an express stipulation for payment of what is commonly called an "occupation rent" in default of possession being given on a specified day, an action in this form has been maintained. (*Tew v. Jones*, 1844, 13 Mee. & W. 12; *Metropolitan Ry. Co. v. Defries*, 1877, 2 Q. B. D. 387).

Corporations aggregate may sue for rent in this form of action in the absence of a lease under seal (*Mayor of Thetford v. Tyler*, 1845, 8 Q. B. 95), and may be sued in respect of premises occupied by them for corporate



purposes, though only, as it seems, for the period of actual occupation (*Finlay v. Bristol, etc., Rwy. Co.*, 1852, 7 Ex. Rep. 409; *Lowe v. London and N.-W. Rwy. Co.*, 1852, 18 Q. B. 632).

A mortgagee cannot, apart from the statute next mentioned, maintain use and occupation against a tenant who is in possession under a lease made by the mortgagor after the mortgage; for he is a stranger to such demise, and unless and until the tenant by attornment or otherwise agrees to become his tenant, there are no contractual relations between them, and the tenant is a mere trespasser (*Towerson v. Jackson*, [1891] 2 Q. B. 484). But if a mortgagor grants a lease under the powers conferred upon him by the Conveyancing Act, 1881, it is otherwise; for it has been held that under its provisions a mortgagee may, by giving the requisite notice to the tenant, become entitled to enforce the covenants and conditions of the lease in the same way as if he had been a party (*Municipal Building Society v. Smith*, 1888, 22 Q. B. D. 70; and see *supra*, under *Parties*).

If, on the other hand, the mortgage is subsequent to the lease, the mortgagee, in virtue of the reversion thereby vested in him, may, by giving notice to the lessee of his mortgage, perfect his title to recover rent subsequently accruing, or arrears unpaid at the date of the notice (see 1 Sm. L. C., notes to *Moss v. Gallimore*, at p. 497, and cases there cited).

The rights of a mortgagor to maintain this action, where the demise is not by deed, are for the most part regulated by the Judicature Act, 1873, s. 25 (5), which has already been noticed in treating of the consequences of an assignment of the reversion. This subsection applies whether the lease was made before or after the mortgage. In case of leases subsequent to the mortgage, the provisions of the Conveyancing Act, 1881, which have just been referred to, are material. Apart from statute, the rights of such a mortgagor depend upon the doctrine of estoppel, which forbids the tenant to set up that the landlord who let him into possession had not in fact the reversion of the tenements at that time. c

#### DEVOLUTION OF THE TENANCY.

*Assignment.*—The introduction of new parties to an existing tenancy may be brought about either by the voluntary acts of the parties themselves, or by the operation of some rule of law which vests the estate of either in a third person. In the wider sense of the term, these are all cases of assignment, and an executor of a tenant, for instance, is constantly spoken of as the assignee of his interest; but the primary meaning of assignment is the actual transfer by the lessor of his reversion, or by the lessee of his term, to a stranger. This obviously involves a rearrangement of the contractual relations hitherto existing between the original parties, either by the terms of the letting, or by the legal implications inseparable from a demise; for such relations are in many cases independent of the continuance of the estate, and, on the other hand, the person who succeeds to it is not necessarily bound by the undertakings of his predecessor. And it is in connection with this branch of the subject that most difficulty has been experienced.

A deed is requisite for a valid assignment either of the reversion or the term. In the case of freehold interests this is a rule of law, whilst, as regards leaseholds, it is enacted by 8 & 9 Vict. c. 106, s. 3, that "an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments shall be void at law unless made by deed." Nevertheless, acceptance of rent from a tenant who comes in under an invalid assignment, or payment of the old rent to an assignee of the reversion without a deed, may

create an implied tenancy between the parties from year to year; but while a tenant is estopped from disputing the title of the person under whom he entered at the time of such entry, he is at liberty to prove that payment of rent to a new landlord was made under a mistake, and does not therefore amount to a recognition of his title (*Doe v. Barton*, 1840, 11 Ad. & E. at pp. 312, 313, per Lord Denman, C.J.).

Both an agreement to assign and a contract to procure the transfer of a lease are within the 4th section of the Statute of Frauds, and must be in writing, or proved by a memorandum in writing (*Buttemere v. Hayes*, 1839, 5 Mee. & W. 456; *Horsely v. Graham*, 1869, L. R. 5 C. P. 9).

It was pointed out in an early part of this article that it is essential to a lease that the grant should be of a less estate than that vested in the lessor, so that he may retain a reversion. If, therefore, a landlord, by what purports to be a lease, grants the whole of his estate, or a lessee, by what is in form an underlease, sublets for the whole residue of his term, both these instruments are at law assignments (*Beardman v. Wilson*, 1868, L. R. 4 C. P. 57); and a demise for a greater interest than that possessed by the grantor has the same effect (*Baker v. Gostling*, 1834, 1 Bing. N. C. 19). In order to obviate injustice, however, the so-called rent reserved by such instruments will be considered as in the nature of rent (*ibid.*); and if, not being by deed, they should be invalid as assignments, they may operate as valid leases or underleases (*Pollock v. Stacy*, 1847, 9 Q. B. 1033). But for want of the reversion the grantor has no right of distress.

Where the lands under lease are situate in the Bedford Levels, or in Yorkshire or Middlesex, assignments, unless within the special exemptions contained in the several Registry Acts of these districts, must be registered pursuant to their provisions, in order to secure priority against a subsequent incumbrance. The Acts in question are treated under the title REGISTRATION.

(1) *Assignment by the tenant*.—In addition to the restrictions prescribed by law as to the mode in which assignments can be effectually made, a disability to assign may be imposed upon the tenant by the lease itself; but apart from this, he is entitled to assign his interest under it, whether it is one for years or from year to year (*Allcock v. Moorhouse*, 1882, 9 Q. B. D. 366). The various forms of covenants not to assign, alienate, or underlet commonly found in leases have been briefly discussed under COVENANTS IN LEASES (see vol. iv. pp. 21–23). In addition to what has there been said, it is important to mark the distinction between such a covenant and a *condition* to the same effect. For while the breach of a condition, subject to which the lease is granted, gives the lessor an immediate right of re-entry, such a covenant, unless supplemented by a proviso that the lease shall be determinable upon breach thereof (or to that effect), does not invalidate an assignment made in defiance of its provisions, or give a right of re-entry (*Parul v. Nurse*, 1828, 8 Barn. & Cress. 486, per Holroyd, J.). The distinction between the terms which create respectively a covenant and a condition not to assign is fully considered in the judgment delivered by Bayley, J., in *Doe v. Watt* (*ibid.* 308). In case of the breach of such a covenant, a landlord may recover from the lessee the damages which he suffers thereby, the measure of which has recently been held to include that which was a probable, although not inevitable, result of the unauthorised assignment; as where the premises were sublet to a person carrying on a dangerous business, and in consequence burnt down (*Jepla v. Rogers*, [1892] 1 Q. B. 31). And breaches of a covenant against assigning without licence may in a proper case be

restrained by injunction (*Bridewell Hospital (Governors of) v. Fawkner*, 1892, 8 T. L. R. 637).

Under ordinary circumstances, it is for the lessee to obtain the lessor's assent, if requisite, to an assignment or underlease which the former has agreed to make, and he must bear any loss arising to himself from his failure to obtain it, even where a proposed sub-tenant has in the meantime been let into possession (*Fawkner v. Booth*, 1893, 10 T. L. R. 83); but if the contract for assignment is in terms subject to the landlord's approval, he discharges his duty by taking all reasonable steps to induce him to consent, and is not bound to institute proceedings at law (*Lehmann v. M'Arthur*, 1868, L. R. 3 Ch. 496).

The effect of a licence to assign or underlet, where a lease may be determined by doing such acts without a licence, is restricted by statute (22 & 23 Vict. c. 35) to the particular assignment or underlease authorised, unless otherwise expressed; and a partial licence—that is to say, one limited to the interest of one of several joint lessees, or to a part only of the premises demised—does not prejudice the rights of the lessor as regards other interests or other parts of the premises (ss. 1, 2).

A licence to "transfer the lease" to persons named was held to justify their being let into possession, without the actual execution of a transfer (*West v. Dobb*, 1870, L. R. 5 Q. B. 460). And a landlord may by acquiescence in the tenancy of an assignee preclude himself from insisting on a forfeiture under the terms of the original lease, though clear evidence is required to establish such a case (*ibid.*, per Kelly, C.B., p. 463; *Willmott v. Barber*, 1880, 15 Ch. D. 96).

What form of proviso for re-entry is sufficiently wide to embrace a breach of a negative covenant, such as that now under consideration, involves questions of construction, which are discussed below under the head of *Forfeiture*.

In order to make the assignee a party to the tenancy, it is necessary to create privity of estate between him and the lessor; hence, a complete legal assignment is requisite, and a mere equitable mortgage by depositing a lease as security for an advance does not make the deposittee a party. A specific or separate grant of an interest under a lease is not, however, essential, and it may be conveyed by a general assignment in terms which naturally include it, as where a debtor assigned "all his personal estate" for the benefit of creditors (*White v. Hunt*, 1870, L. R. 6 Ex. 32). It was held in that case that the assignee became liable for the rent of a house let from year to year to the debtor, although the former never expressly accepted the lease, but had merely executed the deed of assignment. In deciding whether leasehold interests pass under general grants of personal estate, the ordinary rules of construction, such as that of *ejusdem generis*, will be applied (*Harrison v. Blackburn*, 1864, 17 C. B. N. S. 678). An assignment is effectual without actual entry by the grantee, so that a mortgagee out of possession has been held liable on the covenants of the lease (*Williams v. Bosanquet*, 1819, 1 B. & B. 238; 21 R. R. 585), and it is therefore usual to make mortgages of a tenant's interest by way of underlease.

Rights of the lessor after assignment of the term.—The first question is how far a tenant who thus parts with his estate in the tenements gets rid also of his liability to the lessor. If the lease is by deed, it has long been clearly settled that he continues to be liable on the express covenants, while his liability upon covenants merely implied at law from the use of words of established legal meaning comes to an end if the lessor accept the assignee as tenant, either tacitly or expressly (*Auriol v. Mills*, 1790, 4 T. R.

94; 2 R. R. 341). Instances of such implied covenants, which are technically called "covenants in law," are those implied from the reddendum, and from the use of the word "demise" respectively, for payment of rent and for quiet enjoyment. They are apparently excepted in this way on the ground that they ought only to be implied so long as the privity of estate between the parties to the lease is not determined with the lessor's assent.

The acceptance of the assignee as tenant referred to above is an acceptance of him as assignee, and not as tenant in substitution for the original tenant; for recognition of the latter kind might after possession amount to a surrender of the old tenancy and the creation of a new one (see SURRENDER).

If a lease for a term is made by parol, the doctrine by which a lessee is held to his unqualified contracts throughout the term, notwithstanding assignment, would seem in principle to apply as much as to covenants in a lease by deed, especially as simple contracts do not run with the land so as to give the lessor an alternative right of action against the assignee. There appears, however, to be an absence of authority as to this question. The position, again, of a tenant from year to year, after he has assigned, is by no means clear. His case is peculiar because he loses the power of determining the tenancy by notice to quit, and Baron Parke appears to have thought that if the lessor tacitly acquiesces in the assignment by failing to give notice to quit to the assignee, a complete transfer of the contract of tenancy ought to be implied as a matter of law (*Buckworth v. Simpson*, 1835, 1 C. M. & R. 834; cp. *Allcock v. Moorhouse*, 1882, 9 Q. B. D. 366).

The mutual rights of the lessor and the assignee arise out of the privity of estate created between them by the grant of the whole of the lessee's interest, so that the lessor has the immediate reversion expectant on the particular estate of the assignee. The distinction to be observed is no longer between actual covenants and covenants in law, but between those which run with the land and those which are merely personal or collateral. The doctrine of the common law by which the benefit and burden of covenants, which concern and touch the thing demised and are said to run with the land, are transmitted to assignees of the term, applies exclusively to leases by deed, and such an assignee could neither sue the lessor nor be sued by him upon the stipulations of a parol demise (*Elliott v. Johnson*, 1866, L. R. 2 Q. B. 120). Under special circumstances, however, a new yearly tenancy upon the terms of the lease might be implied (*Buckworth v. Simpson*, 1835, 1 C. M. & R. 834). The rule by which restrictive covenants entered into by the lessee are binding upon an assignee who has actual or constructive notice of them has an entirely distinct origin, and is based upon equitable considerations, which apply equally to agreements not under seal. Both these doctrines have already been treated under the head of COVENANTS IN LEASES (vol. iv. pp. 19-21), and it is unnecessary, therefore, to examine them further.

The liability of an assignee who takes through one or more mesne assignments is to be determined by the same rules as that of the first assignee, nor can he limit his obligations either to the lessor or the lessee by stipulations introduced into the assignment to himself (*Moule v. Garrett*, 1872, L. R. 7 Ex. 101). But every assignee, if he re-assigns, gets rid of liability to the lessor for subsequent breaches; and an assignment even to a pauper is effectual provided it is not merely collusive so as to constitute the pretended assignee no more than an agent for the assignor, who remains the real owner and receives the profits (*Hopkinson v. Lovering*, 1883,

11 Q. B. D. at p. 97). Rent will be apportioned down to the date of the re-assignment (*Swansea Bank v. Thomas*, 1879, 4 Ex. D. 94).

**Lessee and assignee.**—It is usual to insert in assignments of a lease a covenant on the part of the assignee to indemnify the assignor against the consequences of any default by the former in performing the obligations imposed by the lease. Under such a covenant his liability is limited to the period of his own interest, unless clear terms are used to extend it (*Wolveridge v. Steward*, 1833, 1 Cr. & M. 644), but it will include the costs incurred by the lessee in unsuccessfully defending an action brought against him by the landlord, if it was reasonable and proper for him to dispute the amount of the damages claimed (*Howard v. Lovegrove*, 1870, L. R. 6 Ex. 43; *Murrell v. Fysh*, 1883, C. & E. 80). In such a case the assignee may now be brought in as third party.

A claim against an assignee under such a covenant is provable in bankruptcy, unless otherwise ordered by the Court, and is therefore barred if he obtains an order of discharge (*Hardy v. Fothergill*, 1888, 13 App. Cas. 351).

Even in the absence of this covenant every assignee for the time being is by legal implication bound to indemnify the original lessee for payments which he has been compelled to make—or, being compellable, has made—owing to breaches by such assignee of covenants in the lease binding upon him during his possession. This right arises from the common obligation of both lessee and assignee under a contract of which the latter takes the entire benefit, and is therefore available against an ultimate assignee who takes through mesne assignments in the same way as against an immediate assignee (see *Moule v. Garrett*, 1872, L. R. 7 Ex. 101). The position of a lessee in this respect has often been compared to that of a surety for the assignee; but the analogy is imperfect, inasmuch as both are primarily liable to the lessor, and if he sues the lessee, the defences peculiar to a surety cannot be set up (*Baynton v. Morgan*, 1888, 22 Q. B. D. 74). Consistently with the principle explained above, this implied liability of an assignee lasts only so long as he is in possession, and ceases upon re-assignment (*Crouch v. Tregonning*, 1872, L. R. 7 Ex. 88). Nor is a mortgagee by sub-demise from an assignee liable to indemnify a lessee for rent paid by him to avoid a forfeiture, although by the terms of the mortgage deed the former having entered into possession was bound to pay it; for an indemnity is only implied when both parties are directly liable for the obligation discharged by one (*Bonner v. Tottenham Building Society*, 1898, 14 T. L. R. 216). An assignee who re-assigns retains no interest in the term even where he takes a covenant of indemnity, and cannot, upon the default of his assignee, claim to exercise an option reserved by the lease to determine it (*Seaward v. Drew*, 1898, 14 T. L. R. 200).

If, however, the premises were, to the knowledge of the lessee, used for immoral purposes, a claim for indemnity by the lessee in respect of payments made by him to the landlord in consequence of breaches of covenant committed by the assignee will not be enforced, even where there was an express covenant of indemnity (*Smith v. White*, 1866, L. R. 1 Eq. 626).

Under the Conveyancing Act, 1881, s. 3 (1), in the case of a contract to sell or assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion—that is to say, to the reversion of that leasehold interest out of which the term of years contracted to be sold or assigned is derived (*Gosling v. Woolf*, [1893] 1 Q. B. 39). This applies only to sales properly so called, and in so far as a contrary intention is not expressed in

the contract of sale (s. 3 (8)). A similar provision as to underleases is contained in sec. 13.

(2) *Assignment by the landlord.*—The legal incidents which now attend an assignment of the reversion of lands under lease are largely the creation of statute. At common law it did not make the lessee a tenant of the assignee without the consent of the former. He could not be made a vassal against his will. A right to distrain for rent did pass to the assignee, this being incident to the reversion. But he could not re-enter under a condition, or sue upon the covenants of the lease (see *Scaltock v. Harston*, 1875, 1 C. P. D., per Archibald, J., at p. 109). Then by a statute passed upon the dissolution of the monasteries (32 Hen. VIII. c. 34), it was enacted that assignees of the reversion should have the same rights of action and re-entry against lessees, and their executors, administrators, and assigns as the lessors had; and conversely, that the lessees should have the same rights of action against assignees of the reversion as they had against the lessor. This was afterwards supplemented by the Statute 4 Anne, c. 16, which did away with the necessity for attornment by the tenant, but at the same time protected him from the consequences of paying rent to his former landlord so long as he had not notice of the assignment.

And, lastly, the Conveyancing Act, 1881, as regards leases within its scope, provides in effect that rent and the benefit of a lessee's covenants, and of conditions for re-entry or otherwise, shall run with the reversion, as well as the obligation of covenants entered into by the lessor, provided that the covenants relate to the subject-matter of the lease (ss. 10, 11). These sections apply only to leases made since 1881. Unfortunately no definition of "lease" is given in the interpretation clause of the Act, and it is left open to conjecture whether it includes instruments not under seal; it seems probable that it does not, and the special meaning given to the term for the purposes of sec. 18 (see subs. 17) is in favour of this view.

Where a mortgagor in possession made a lease under the powers conferred by sec. 18 of this Act, it was held that the mortgagee, after giving notice to the tenant, became entitled, like an assignee of the reversion, to enforce the covenants and conditions of the lease against him\* (*Municipal, etc., Society v. Smith*, 1888, 22 Q. B. D. 70).

The Statute of Henry VIII. in terms applies only to indentures of lease, and it is well settled that only covenants which, as between landlord and tenant, run with the land, are within its provisions, and not collateral covenants (see 1 Sm. L. C. 52); but an heir, a devisee of the reversion, or an executor may all be "assignees" within its meaning (Leake on *Contracts*, p. 1054, 3rd ed.). An assignee therefore of the reversion of a parol demise cannot sue the lessee upon its stipulations, though he may distrain or bring an action of waste, or of debt, or use and occupation for rent. But if the tenant assign the term before the landlord assigns the reversion he is not liable to the latter's assignee even for rent, inasmuch as there never was privity of estate between them, and the Statute of Anne does not apply (*Allcock v. Moorhouse*, 1882, 9 Q. B. D. 366).

In case of a tenancy from year to year payment of rent to the successor of the landlord, and the absence of a notice to quit, are grounds for inferring a mutual consent to go on upon the same terms as before (*Cornish v. Stubbs*, 1870, L. R. 5 C. P., per Willes, J., at p. 339); just as in the converse case, where rent is paid by a successor of the tenant (*Buckworth v. Simpson*, 1835, 1 C. M. & R. 834).

And the doctrine by which assignees of the term are bound by

restrictive covenants or stipulations of which they have notice, applies equally to assignees of the reversion, who take the benefit or burden of such contracts, although they may neither run with the reversion by statute nor with the land by common law (*Clegg v. Hands*, 1890, 44 Ch. D. 503; cp. *White v. Southend Hotel Co.*, [1897] 1 Ch. 767; and *Birmingham Breweries v. Jameson*, 1898, 14 T. L. R. 223).

By the Statute of Anne the grant of the reversion of any messuages or lands shall be effectual without the attornment of the tenant upon whose particular estate the reversion is expectant (see *Allcock v. Moorhouse*, *supra*).

The result, therefore, appears to be that an assignee of a reversion is entitled as against the lessee to the benefit (1) of all covenants running with the reversion; (2) of covenants by the lessee relating to the demised premises, restrictive in nature, and for the advantage of the lessor; and that he in turn is bound (1) by covenants which at law run with the land, and (2) by covenants on the part of the lessor of a negative or restrictive character, of which he has actual or constructive notice. The tenant's possession is for this purpose notice to the assignee of his interest in the premises (*Daniels v. Davison*, 1809, 16 Ves. 249; 10 R. R. 171; *Lewis v. Stephenson*, 1898, 67 L. J. Q. B. 296).

As regards conditions in a lease, the Statute of Henry VIII. expressly gives an assignee of the reversion the same rights of re-entry as the lessor; and it is not necessary that notice of the assignment should have been given to the tenant, except when the breach is non-payment of rent, and therefore within the protecting clause of the Statute of Anne (*Scaltock v. Harston*, *supra*).

An assignee of the reversion is not entitled to sue either for rent which became due, or in respect of breaches committed, before the assignment, although, in the case of continuing breaches, such as of a covenant to keep in repair, the tenant may be in effect made liable to him for dilapidations which occurred previously. Rent in arrear is no part of the reversion; it is a mere chose in action (*Sharp v. Key*, 1841, 8 Mee. & W. 379, per Parke, B.). And in the same way the right of re-entry under a condition can only be exercised in respect of breaches which have occurred since the reversion was vested in the assignee.

Where a right of action is by the Statute of Henry VIII. given to the assignee of the reversion, it would seem that the assignor loses his right to sue upon the covenants of the lease, the statute, according to legal doctrine, transferring the privity of contract (1 Sm. L. C. p. 70). The right to sue upon covenants which do not run with the reversion, or upon the stipulations of a parol demise, remains to him (*Stokes v. Russell*, 1790, 3 T. R. 678; 1 R. R. 732; *Bickford v. Parson*, 1848, 5 C. B. 920).

Severance.—A partial assignment by the owner of premises under lease is called a severance of the reversion. This is of two kinds. He may grant a portion only of his estate in the whole premises, or he may grant his whole estate in a portion of them. These are technically described as grants of "part of the reversion," and of "the reversion of part" respectively. Covenants, if apportionable, run with the reversion in both cases; but conditions were at law enforceable by grantees of the former and not of the latter class; the objection being that a condition could not be apportioned by an act of the party. This has to a considerable extent been altered by statute. By the 22 & 23 Vict. c. 35, s. 3, if the rent or other reservation is legally apportioned (which means either by consent or by a jury), the assignee of each part of the reversion shall have the benefit of any condition



in the lease for re-entry on non-payment of the original rent or reservation, in like manner as if it applied to non-payment of the portion allotted or belonging to him.

This section, it will be seen, applies only to re-entry for non-payment of rent, but the Conveyancing Act, 1881, has gone much further, and provides in effect that, as regards all leases within its scope, in case of severance of the reversionary estate, all conditions, which would have run with the unsevered estate shall be apportioned to the severed parts (s. 12).

Where a reversion was so devised that it became vested in several persons as tenants in common, it was held that one of such persons could sue the lessee either upon a covenant running with the land or for wrongful acts causing injury to the reversion, without joining the other tenants in common as co-plaintiffs (*Roberts v. Holland*, [1893] 1 Q. B. 665).

*Attornment.*—This word is derived from the French *atourner*, and as a legal term signified the transfer of allegiance or duty under an existing tenancy to the grantee of the lord. Littleton mentions as common forms of attornment, to say, "Sir, I attorn to you by force of the said grant," or "I become your tenant," or to deliver to the grantee a penny, half-penny, or farthing by way of attornment. The necessity for this assent of the tenant to a transfer of the reversion was limited to grants, and did not extend to the succession of an heir or a devisee. So long as feudal tenures were in full force, it was obviously unjust that a tenant should be passed on from one lord to another against his own will by the voluntary grant of the lord. Eventually, by the Statute of Anne, to which reference has frequently been made (4 Anne, c. 16, s. 9), it was declared that all grants of any manors or rents, or of the reversion or remainder of any messuages or lands, should be effectual for all purposes without any attornment of the tenants of such manors, or of the land out of which such rent issues, or of the particular tenants upon whose estates the reversion or remainder is expectant or depending.

Practically, in recent years attornments have been confined to indentures of mortgage, in which it is usual to provide that the mortgagor attorns, at a rent certain, tenant to the mortgagee of the premises charged; the object being by the creation of this artificial tenancy to secure to the latter the right to distrain for what is in fact the principal or interest of the mortgage debt. The whole subject has been treated at some length under ATTORNMENT.

*Execution.*—The modes of devolution considered hitherto consist in voluntary acts of the parties themselves; those now to be discussed are independent of or contrary to their will. There are two writs of execution, *fieri facias* and *elegit*, by which the interest of a party to a lease may be taken, if he has a judgment entered against him. The first is only available against leasehold interests, while the second extends to freeholds. Under the first the debtor's interest in the lease is sold by the sheriff, and vests in the purchaser; under the second, it vests in the execution creditor, who becomes in legal language a tenant by *elegit*, and so continues until the judgment debt is satisfied.

Neither seizure nor sale under a *fi. fa.* divests the debtor of the term, which remains in him until the sheriff has by deed assigned it to the purchaser, who thereupon stands in the same legal position as an ordinary assignee of a term, while the tenant remains liable upon the express covenants of the lease in the same way as if he had been the assignor. The sheriff has no power to put



the purchaser into possession against the will of the tenant. The tenant's interest in the term may be sold without regard to an agreement for its purchase which has not been carried into effect. But an equitable interest cannot be taken, and can only be reached by the appointment of a receiver by the Court.

A writ of *elegit* is the appropriate remedy for a judgment creditor of a lessor, as it extends to all lands of which the latter or any person in trust for him shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, or over which he shall have any disposing power for his own benefit (1 & 2 Vict. c. 110, s. 11). It no longer extends to the goods of the debtor as formerly, but leasehold interests are not exempted from its operation (Bankruptcy Act, 1883, s. 146; *Richardson v. Webb*, 1884, 1 Morr. 40).

When a writ of *elegit* is executed against a lessor, his legal estate is vested in the execution creditor by virtue of the return of the sheriff that the lands in question have been extended by him. In other words, he becomes an assignee of the reversion, and is bound by any lease made before the lands were actually delivered in execution (27 & 28 Vict. c. 112, s. 1). He is not put into actual possession by the sheriff, but after such return may recover rent which has accrued since the inquisition either by action or distress (*Hatton v. Haywood*, 1874, L. R. 9 Ch. 229); but not rent which became due between the delivery of the *elegit* to the sheriff and the inquisition necessary under the writ (*Sharp v. Key*, 1841, 8 Mee. & W. 379). And he is entitled to determine existing tenancies in any way in which they could have been lawfully determined by the execution debtor, and, if necessary, to bring ejectment (*Doe v. Wharton*, 1798, 8 T. R. 2). But the interest of a tenant by *elegit* is determined when he has received the amount to which, upon taking accounts in the Court out of which execution issued, he is found to be entitled (1 & 2 Vict. c. 110, s. 11). These will be taken in a similar way to that adopted in the case of a mortgagee in possession (see *Bull v. Faulkner*, 1847, 1 De G. & Sm. 686).

The execution of a writ of *elegit* is subject to various statutory rules enacted for the protection of purchasers subsequently to the judgment debt. The writ must be registered and put in force within three calendar months of such registration, otherwise it will be invalid as against purchasers for value and mortgagees, and, indeed, against any person who for valuable consideration takes any interest in or charge upon the lands in question (23 & 24 Vict. c. 38, s. 1; 51 & 52 Vict. c. 51, ss. 4, 5, 6). And land is not bound by a judgment until actually delivered in execution under an *elegit* (27 & 28 Vict. c. 112, s. 1). If all these rules have been complied with, the execution creditor may, under the 4th section of the last-mentioned Act, apply to the Court to order the sale of the debtor's interest.

If the debtor has merely an equitable estate in lands, it cannot be taken under an *elegit* unless the legal estate is held in trust for him alone (*Hatton v. Haywood*, *supra*). The proper remedy against an equitable estate is to apply for the appointment of a receiver by the Court, such appointment being equivalent to the delivery in execution required by the above statute (*Cadoogan v. Lyric Theatre*, [1894] 3 Ch. 338).

**Bankruptcy.**—The effects of the bankruptcy of a landlord do not require special consideration. Upon adjudication his property passes to the official receiver, and upon the appointment of a trustee, to such trustee, both being trustees for the purposes of the Act, and included in the term as here used. Inasmuch as this is at law an assignment of the reversion, it determines a

tenancy at will as soon as it is known to the tenant (*Doe v. Thomas*, 1851, 6 Ex. Rep. 854).

The devolution of the interest of a lessee upon his own bankruptcy depends, in the first place, upon the provisos of the lease, which frequently provide for re-entry or determination of the term in such an event. It would exceed the limits of this article to enumerate the various forms of this proviso which have received judicial interpretation. It is sufficient here to refer to three modern decisions. Filing a petition for a receiving order under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), has been held equivalent to "filing a petition for liquidation" in the construction of a forfeiture clause (*Ex parte Gould*, 1884, 13 Q. B. D. 454). On the other hand, a proviso for re-entry, "if the lessee, his executors, administrators, or assigns shall become bankrupt," applies only to the person for the time being possessed under the term; so that the bankruptcy of a lessee, after he has assigned over, does not entail a forfeiture, at anyrate if the assignment has been approved by the lessor (*Smith v. Gronow*, [1891] 2 Q. B. 394). It was doubted in that case whether the annulment of a bankruptcy, which rendered a lease voidable, after the lessor had elected to re-enter, would affect his rights. But a lessee is not "duly adjudicated bankrupt" if the adjudication was in fact invalid (*Doe v. Ingleby*, 1846, 15 Mee. & W. 465). The effect of every proviso of this kind, even where it declares that a lease shall become void, or that the term shall cease, is merely to render it voidable at the election of the lessor, who may waive the forfeiture by accepting rent from the trustee. And by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), where the premises let do not come within the description given in sec. 2 (3), the right to enforce such a forfeiture is suspended for a year from the date of the bankruptcy, during which the lessee's interest may be sold, or relief in a proper case granted under the Conveyancing Act, 1881, s. 14. These statutes are more fully considered hereafter under *Forfeiture*.

Assuming that the tenant's interest in the tenements survives his bankruptcy, it passes to the trustee for the purposes of the Bankruptcy Act under the vesting sections (44 and 54). These sections operate to transfer not only tenancies (including those from year to year), but an option to call for a lease (*Buckland v. Papillon*, 1866, L. R. 2 Ch. 67), or a mere agreement to grant one at a future time. But a trustee who claims specific performance of such an agreement will be required to enter personally into the same covenants as by the agreement would have been imposed upon the bankrupt (*Powell v. Lloyd*, 1828, 2 Y. & J. 372).

The trustee has no election to refuse or accept the debtor's leasehold interests, his only remedy being by disclaimer or re-assignment, in the absence of which he is liable from the date of his appointment for rent and breaches of covenant in the same way as an ordinary assignee, whether or not he has actually taken possession or had any beneficial occupation (*Titterton v. Cooper*, 1882, 9 Q. B. D. 473, per Cotton, L.J.). It has recently been held that his liability for the first rent which falls due after the order of adjudication ought to be apportioned from its date, but this appears to involve a departure from the rule which has hitherto prevailed as to the liability of an assignee of a term (*In re Wilson*, 1893, 62 L. J. Q. B. 628).

He is entitled to get rid of his liability by assigning over, and may disregard stipulations in the lease against alienation even when they expressly apply to an assignee by operation of law (*In re Johnson*, 1894, 70 L. T. 381); and a proviso for re-entry if the lessee, his executors, administrators, or assigns should alienate without the lessor's consent was held in an old case to be inoperative to prevent assignees in bankruptcy from assigning

the lease to a vendee without the lessor's consent (*Doe v. Bevan*, 1815, 3 M. & S. 353; 16 R. R. 293). The ground of this decision was that the law must allow the assignee to divest himself of the property, and convert it into a fund for the creditors, and that the sale therefore was not such a voluntary assignment as was prohibited by the covenant.

The trustee may, like ordinary assignees, assign to a "man of straw," so long as the assignment is not collusive (*Hopkinson v. Lovering*, 1883, 11 Q. B. D. 92).

He has also by the 55th section of the Bankruptcy Act the right to disclaim onerous property of the bankrupt. This has in a previous volume been discussed at length under DISCLAIMER, and it seems unnecessary to add anything to what has there been said.

*Death.*—The interest of a tenant in his lease—whether for years or from year to year—passes at his death to his executors, in whom it vests immediately; in case of intestacy the title of an administrator only commences with the grant of letters of administration. Such vesting is not precluded by a specific bequest, because the assent of the executors is requisite to give effect to it. Once this has been given and the bequest accepted, the legatee or devisee succeeds to the legal position of an assignee, with the rights and obligations incidental thereto (*Hawkins v. Hawkins*, 1880, 13 Ch. D. 470). It may be inferred from conduct which clearly amounts to an assent (*Thorne v. Thorne*, [1893] 3 Ch. 196).

And if the estate of the lessor is less than freehold, it will vest in his legal personal representatives in the same way; an observation which now applies also to freeholds under the Land Transfer Act, 1897.

Even where it is freehold they are entitled to recover damages for breaches of covenant committed during the lifetime of the person whom they represent, if the covenants in question are for the benefit of the personal estate, such, for instance, as those for rent or repairs (*Ricketts v. Weaver*, 1844, 12 Mee. & W. 718).

As regards the liabilities of executors or administrators, they are in their representative capacity bound to answer out of the assets which they receive for breaches of covenant committed by the deceased himself, and, with certain qualifications, for those which occur in their own time. They may also by entry upon the demised premises, or some equivalent act, incur personal liability under the lease. This question has already been considered in discussing the remedies of a landlord against the executors of a tenant for rent; and what has there been said as to the distinction between actions maintainable against executors as such, and those maintainable against them as assignees of the term, applies for the most part (see *infra*) equally to those for breaches of covenants other than that for rent. Similarly the operation of Lord St. Leonards' Act (22 & 23 Vict. c. 35) protects executors and administrators, after they have assigned to a purchaser any lease or agreement for a lease granted or assigned to the testator or intestate, from personal liability in respect of any subsequent claim upon any of the covenants or agreements therein; and when all such liabilities as may have accrued due and have been claimed up to the time of such assignment have been satisfied, they may proceed to distribute the residuary estate, provided that, if the lessee had agreed to lay out any fixed or ascertained sum on the premises in question, a sufficient fund has been set apart to answer any future claim (s. 27).

There are, however, as the law now stands, important points of difference. It has been seen that the personal liability for rent of an executor who has

entered upon the demised premises is limited to their yearly value, but this doctrine has been held inapplicable to the covenant to repair (*Tremeere v. Morison*, 1834, 1 Bing. N. C. 89); and an offer to surrender them after expending all the profits which they yielded has been considered to afford no defence to a claim upon such a covenant (*Sleap v. Newman*, 1862, 12 C. B. N. S. 116). The latter judgment, however, was based entirely upon the ground that the matter was concluded by the decision in *Tremeere v. Morison*, as to the accuracy of which Erle, C.J., expressed doubts, and it is possible that if the question should in future be reconsidered in the Court of Appeal, the distinction established by these two cases between actions for rent and for repairs, against executors who have entered, may be overruled (see *Rendall v. Andrew*, 1892, 61 L. J. Q. B. 630, per A. L. Smith, J.).

The right of a person to whom a leasehold house subject to onerous covenants has been bequeathed for life, to have the testator's covenants for rent or repairs satisfied out of his assets by the executors, has been the subject of several decisions. Such a right appears to be established as to liabilities incurred during the testator's lifetime, but whether it extends beyond this is doubtful. The questions involved belong rather to the law of testamentary disposition than to that of landlord and tenant, and it may suffice here to refer to the latest decision in which previous cases are discussed (see *In re Tomlinson*, [1898] 1 Ch. 232).

*Underlease.*—The cardinal distinction between an assignment and an underlease has already been adverted to more than once. By an underlease less than the whole estate of the lessee is parted with, and it is not therefore an instance of devolution in the strict sense of the term. And inasmuch as the sub-lessee does not take the same estate as was granted to the lessee, there is no privity of estate between him and the lessor, and he is not bound at law by the covenants of the original lease which run with the land. For these are only annexed by law to the estate originally granted. But in addition to his common law rights of distress and re-entry for forfeiture (as to the latter of which, see *Kelly v. Rogers*, [1892] 1 Q. B. 910) the landlord has various remedies of equitable origin against a sub-lessee. He can enforce against him all the covenants or stipulations of a restrictive nature in the original lease of which he had actual or constructive notice (*Hall v. Ewin*, 1887, 37 Ch. D. 74); and there is constructive notice of the head lease, if it appears on the face of the underlease that the grantor himself has only a leasehold interest. He may also obtain an injunction to restrain acts of voluntary waste. As regards the relations of lessee and under-tenant, a voluntary surrender by the former does not affect the rights which he has himself granted to the latter (*Mellor v. Watkins*, 1874, L. R. 9 Q. B. 400); and an underlessee cannot effectually surrender to the landlord unless the lessee first surrender his immediate reversion, for otherwise there is no privity. An undertaking by the under-tenant to perform the covenants of the head lease creates no privity of contract with the superior landlord, but operates as a contract to indemnify his immediate lessor (*Hornby v. Cardwell*, 1881, 8 Q. B. D. 329).

A notice to quit which is effectual against the lessor determines also any sub-lease which he may have made (*Pleasant v. Benson*, 1811, 14 East, 234; 12 R. R. 507).

#### DISSOLUTION OF THE TENANCY.

A tenancy may determine either by coming to an end in its natural course, or by being brought to an end by some act of, or arrangement between,

the parties before that time has arrived. Where a tenancy is made to endure for a fixed period or till a certain event happens, and the period expires or the event occurs, the tenancy of course comes to an end. The case of a tenancy determining upon the happening of an event is an instance of what is called a *limitation*, that is to say, of an estate so confined by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail. There are several ways in which, whilst a tenancy is running, it may be brought to an end by the act or acts of the parties. The principal ones are disclaimer and notice to quit in "periodic" tenancies, and surrender and forfeiture in tenancies generally. On these matters reference should be made to special articles dealing with them (see DISCLAIMER; NOTICE TO QUIT; SURRENDER); and, upon the determination of tenancies in yet another manner, namely, by act of law only, reference should be made to the article on LIMITATIONS, STATUTE OF. It is proposed in this place to deal only with the subject of Forfeiture.

*Forfeiture* may arise in one of two principal ways: by breach of covenant or by breach of condition; but apart from these, which depend upon the contract between the parties, it may also arise by act of law by the tenant setting up a title hostile to that of his landlord or assisting another person to do so by delivering up to him possession of the premises and the lease with the intention of enabling him, not to hold under the lease, but to set up such a title (*Doe v. Flynn*, 1834, 1 C. M. & R. 137). But a mere verbal claim to be owner of the premises (*Doe v. Wells*, 1839, 10 Ad. & E. 427), or payment of rent reserved by a lease to a person other than the landlord (*Doe v. Parker*, 1820, Gow, 180; 21 R. R. 827), or a claim of ownership under a contract of purchase (*Rees v. King*, 1800, For. 19) will not entail a forfeiture; as for this result to ensue the act must be of an unequivocal character (*Ackland v. Lutley*, 1839, 9 Ad. & E. 879), and have for its necessary effect prejudice to the position of the landlord. Apart from the question of relief which is now given to a tenant by statute, and which will be discussed presently, the breach of a condition gives the lessor the right of re-entry, a condition being a stipulation for the cesser of a term upon the happening of a prescribed event; while re-entry for the breach of a covenant can only be exercised when a right is expressly reserved to that effect in the lease. The distinction, therefore, between covenants and conditions must not be lost sight of. Where the word "condition" in one form or another is not used, it is necessary, in order that the words should operate as a condition, that it appear clearly that it was intended by non-compliance with the stipulation that the estate created by the lease should be defeated (*Co. Litt.* 203 b); and it is clear that a condition cannot result from the use of words of mere agreement (*Shaw v. Coffin*, 1863, 14 C. B. N. S. 372; *Crawley v. Price*, 1875, L. R. 10 Q. B. 302). So where one party undertakes to do a certain thing upon the doing of another thing by the other, such an undertaking is *prima facie* not a condition but only a covenant (*Doe v. Phillips*, 1824, 2 Bing. 13).

Subject always to the statutory right of relief, forfeiture is thus seen to arise, either by breach of a condition or by breach of a covenant which is covered by the general right of re-entry reserved to the lessor in the lease. In order to decide whether the right of re-entry does or does not apply to the particular covenant, breach of which is complained of by the lessor, the proviso of re-entry will be construed with strictness, as the rule always has been that the lessee is not to be divested of his interest or estate till conclusive proof of the forfeiture be given (see *Toleman v. Portbury*, 1870,

L. R. 5 Q. B. 288). Where, for example, a proviso of re-entry is made to apply in the case of neglect to "perform" covenants, it will not be construed to extend to covenants of a negative character, *e.g.* not to carry on trade; for it is clear that in the strict sense of the word covenants of this kind cannot be "performed" (*West v. Dobb*, 1870, L. R. 5 Q. B. 460; *Hyde v. Warden*, 1877, 3 Ex. D. 72; *Evans v. Davis*, 1878, 10 Ch. D. 747). This, however, has been said in a recent case to be "an extremely narrow construction" (per Kay, L.J., *Barrow v. Isaacs*, [1891] 1 Q. B. 417), and if the word "keep" or "observe" be used, in addition to, or in substitution for, the word "perform," the above result will not hold (*Croft v. Lumley*, 1858, 6 H. L. 672). Where, again, the right of re-entry may be exercised on the commission of some act by the lessee in breach of his obligations, it has been held not to apply to a covenant which, like the covenant to repair, is broken by an act not of commission but of omission (*Doe v. Stevens*, 1832, 3 Barn. & Adol. 299).

The effect of re-entry on the part of the lessor is to revest in him the same estate as was vested in him at the time of granting the lease (*Co. Litt.* 202 a); and consequently, upon exercise of the right, the estate of any person holding under the tenant, *e.g.* a sub-tenant, comes to an end with the tenancy itself (*Great Western Ry. Co. v. Smith*, 1876, 2 Ch. D. 235). But if the lessee by neglecting to fulfil his obligations has already incurred a liability in respect of them, such liability is not determined; nor does it make any difference that it be expressly stipulated that upon the exercise of the right to re-enter the lessor's estate should revest as if the lease had never been made (*Hartshorne v. Watson*, 1838, 4 Bing. N. C. 178). It may be added that where a tenant holds over after the expiration of his term and pays rent to the lessor, any proviso of re-entry in the lease will apply to the yearly tenancy which results from the above circumstances (*Thomas v. Packer*, 1857, 1 H. & N. 669). And where in the same way a yearly tenancy is implied from entry and payment of rent under a void lease, in those cases where specific performance for some reason would be withheld, a proviso of re-entry will also apply (*Doe v. Aney*, 1840, 12 Ad. & E. 476).

By common law no person other than he who had granted the lease himself (or his heirs) could enforce a proviso for re-entry for breach of condition or covenant (Littleton, s. 374); but, so far as regards covenants and conditions which run with the land (see COVENANTS IN LEASES), this has now been altered by statute (32 Hen. VIII. c. 34), and in such cases all grantees of the reversion may enforce the proviso. Nor is it necessary that notice of the assignment of the reversion to them be given to the tenant (*Scallock v. Harston*, 1875, 1 C. P. D. 106), except in the case where the proviso for re-entry relates to the obligation to pay rent (4 Anne, c. 16, s. 10). It is also provided by the Act to amend the Law of Real Property (8 & 9 Vict. c. 106, s. 6) that a right of entry, whether immediate or future, and whether vested or contingent, in or upon any tenements or hereditaments of any tenure, may be disposed of by deed; but this has been held not to apply to a right of re-entry in a lease, so that such right cannot in itself be granted or assigned (*Hunt v. Bishop*, 1853, 8 Ex. Rep. 675; *Hunt v. Remnant*, 1854, 9 Ex. Rep. 635). Moreover, with one exception, the only person entitled to enforce the benefit of a proviso is the owner for the time being of the reversion (*Doe v. Edwards*, 1834, 5 Barn. & Adol. 1065). The exception referred to is in the case where the lessor upon assigning his reversion or, what comes to the same thing, demising for the whole term, expressly reserves to himself the right as against the assignee or lessee to the benefit of the

proviso (*Doe v. Bateman*, 1818, 2 Barn. & Ald. 168; 20 R. R. 399). But it is well established that it is only the *lessor* or his successor in interest who can enforce the benefit of a proviso, and that in no case can the lessee do so. Nor does it make any difference that upon the breach of the obligation which may be in question it be expressly stipulated that a lease is to become void, or that the term is to cease; for expressions of this sort are simply equivalent to a proviso that it shall be lawful for the lessor to re-enter, seeing that it is the object of the clause of re-entry to give an option to the lessor as to whether he will determine the tenancy or not (*Rede v. Farr*, 1817, 6 M. & S. 121; 18 R. R. 329; *Reid v. Parsons*, 1817, 2 Chit. 247; *Doe v. Bancks*, 1821, 4 Barn. & Ald. 401; 23 R. R. 318; *Arnsby v. Woodward*, 1827, 6 Barn. & Cress. 519; *Roberts v. Davey*, 1833, 4 Barn. & Adol. 664; *Bowser v. Colby*, 1841, 1 Hare, 109). Whether the proviso make the lease void altogether or whether it reserve to the lessor merely a right of re-entry, if the lessor wish to take advantage of the proviso he must do some unequivocal act of which the lessee has notice (*Jones v. Carter*, 1846, 15 Mee. & W. 718), and actual entry seems in neither case to be now necessary (*Ware v. Booth*, 1894, 10 T. L. R. 446).

A few words may be added here on the subject of the application of the proviso of re-entry to the case, not of breach of covenant or condition, but of proceedings in bankruptcy or execution being brought against the tenant. A proviso of this sort is not at all uncommon, and its existence, as will be seen presently, is recognised by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13). (See also *Roe v. Galliers*, 1787, 2 T. R. 133; 1 R. R. 445; *R. v. Topping*, 1825, McCle. & Yo. 544; 29 R. R. 839; *Doe v. David*, 1834, 1 C. M. & R. 405; *Dyke v. Taylor*, 1861, 3 De G., F. & J. 467.) It has already been mentioned that where a clause provided for re-entry on the lessee committing an act of bankruptcy upon which he should be duly found bankrupt and the adjudication proved to be invalid, it was held that the right of re-entry had not accrued (*Doe v. Ingleby*, 1846, 15 Mee. & W. 465), though a clause expressed to take effect on the lessee filing a petition in liquidation applies in the case where he presents a petition in bankruptcy (*Ex parte Gould*, 1884, 13 Q. B. D. 454).

The most important case of the exercise of the lessor's right of re-entry upon breach or non-fulfilment of a tenant's obligations is of course in the case of rent; and every properly drawn lease or agreement should contain a clause reserving liberty to the landlord in the event of non-payment to re-enter upon the expiration of a specified number of days (usually twenty-one) after the days appointed for payment. The lease or agreement should also expressly stipulate that the right of re-entry may be exercisable without the necessity of a demand for the rent (*Goodright v. Cator*, 1780, 2 Doug. 477; *Doe v. Masters*, 1824, 2 Barn. & Cress. 490; 26 R. R. 422), as otherwise the lessor, in order to exercise it, must either comply with all the technical requirements of the common law, or at all events with those prescribed by the Common Law Procedure Act. The requirements of the common law in respect of demands must be strictly observed for the benefit of the forfeiture to attach, and they are the following (see notes to *Duppa v. Mayo*, 1668, 1 Wms. Saun. at p. 434):—(a) A demand of rent must be made by the landlord or by an agent duly authorised in that behalf. (b) It must be made on the exact day when the rent is payable to save the forfeiture, and at such hour before sunset as will afford sufficient time (as it is said) for the money which is due to be counted if the tenant should pay it, the person making the demand remaining on the land until sunset in order constructively to continue it until that hour (*Doe v. Paul*, 1829, 3 Car. & P. 613; *Acoccks v.*



*Phillips*, 1860, 5 H. & N. 183). (c) It must be made at the place specified in the lease for payment or, in the absence of any provision to that effect, at the most notorious place on the land, such as the front door of a house. It must apparently be made though there be no one on the premises on whom to make it (*Co. Litt.* 201 b), but if there be a sub-tenant the demand will be sufficient if addressed to him (*Doe v. Brydges*, 1822, 2 Dow. & Ry. 29; 25 R. R. 552). (d) It must be of the exact sum due, and specify the rent to which it relates; and should there be more than one instalment in arrear, it will be invalid if it relate to any other than the last (*Doe v. Paul*, *supra*). But where a lease itself provides for a demand being made, it would appear that none of the above ceremonies need be observed, an ordinary demand being sufficient; though, if the proviso stipulate for re-entry within a certain number of days after the rent becomes due "being demanded," the demand cannot be made before the last of such days has expired (*Phillips v. Bridge*, 1873, L. R. 9 C. P. 48).

As regards the Common Law Procedure Act (15 & 16 Vict. c. 76), its object was to enable the landlord to dispense with the necessity of a demand; but, as will be presently seen, compliance with its requirements is not always possible. The enactment (as qualified by the Statute Law Revision Act, 1892) is in the following terms:—"In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, which service shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that a half-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made" (s. 210). The mere fact that the clause of re-entry in itself expressly requires a demand does not prevent the statute from applying; with the result that, if the conditions it prescribes are fulfilled, the demand, though expressly stipulated for, may be dispensed with (*Doe v. Alexander*, 1814, 2 M. & S. 525; 15 R. R. 338; *Doe v. Wilson*, 1822, 5 Barn. & Ald. 363; 24 R. R. 423). The enactment applies, as has been seen, "between landlord and tenant"; but the word "tenant" includes an assignee by mortgage (see *Hare v. Elms*, [1893] 1 Q. B. 604) as well as an under-lessee (*Doe v. Byron*, 1845, 1 C. B. 623). In the next place, the statute requires that, at the time of service of the writ, at least a half-year's rent must be in arrear; and where the distress which the statute requires to be made produces a sum sufficient to bring the amount of rent due under the amount of a half-year's rent, the right of re-entry given by the statute is at an end, because the requirements of the Act are no longer fulfilled (*Cotesworth v. Spokes*, 1861, 10 C. B. N. S. 103).

Moreover, the results of the distress must be insufficient to countervail the arrears then due: a provision which has been construed to mean, in the case where more than a half-year's rent is due, the whole of the arrears then due (*Cross v. Jordan*, 1853, 8 Ex. Rep. 149). It would seem that, even though it be obvious that the distress would be altogether



insufficient to satisfy the arrears, it is still necessary to make it (*Thomas v. Lulham*, [1895] 2 Q. B. 400). But the statute does not provide any limit of time for making the distress, so that it may apparently be made at any moment down to the time of service of the writ. It has been decided that all the premises conveyed by the lease must be subjected to a strict search, to see whether a sufficient distress within the terms of the statute can be found (*Rees v. King*, 1800, For. 19; and see *Wheeler v. Stevenson*, 1860, 6 H. & N. 155). But where goods on the premises are concealed or locked up in such a manner that a distrainer, using reasonable diligence, would not be able to find them, they are not to be "found" within the meaning of the Act (*Doe v. Dyson*, 1827, Moo. & M. 77; 31 R. R. 715; *Doe v. Franks*, 1847, 2 Car. & Kir. 678; *Hammond v. Mather*, 1862, 3 F. & F. 151). Lastly, the statute requires that the lessor should have a right by law to re-enter for non-payment of the rent: *i.e.* an absolute right entitling him to avoid the lease, as distinguished from a mere right to re-enter and hold the premises until the rent is paid (*Doe v. Bowditch*, 1846, 8 Q. B. 973). And such right must be vested in the lessor at the moment of service of the writ in ejectment (*Doe v. Roe*, 1849, 7 C. B. 134).

The question of *relief* from forfeiture is now almost wholly regulated by the provisions of the Conveyancing Acts, 1881 and 1892; but before those Acts were passed, power had been given by statute to Courts of common law to grant relief from forfeiture for non-payment of rent. This power is left untouched by the Conveyancing Acts: the relief given by which statutes, it is specially provided, is not to affect the law relating to re-entry or forfeiture in case of non-payment of rent. This matter will accordingly be dealt with separately at a later stage. Courts of equity, moreover, had statutory power to relieve in the case of forfeiture by reason of breach of the obligation to insure. Also, under certain special circumstances, such as fraud, mistake, or accident, calling for their interposition, they had an inherent jurisdiction to grant relief. The statutes giving power to relieve in the case of non-insurance are now repealed, being replaced by the provisions of wider scope in the Conveyancing Acts, which it will be now necessary to consider.

By 44 & 45 Vict. c. 41, it is provided (s. 14) that "a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach" (subs. 1). The words "or otherwise," it is thought, are added in order to meet the case where the lessor is seeking to re-enter by taking possession, as in certain cases he is entitled to do, in a summary manner.

The notice, which is required by the Act to be in writing (s. 67, subs. 1), must be sufficiently specific for the tenant to be able to gather with reasonable clearness what it is that he is called upon to do, so that no action of forfeiture should be brought against him before he is given a fair opportunity of remedying the breach, where it is capable of remedy (*Fletcher v. Nokes*, [1897] 1 Ch. 271). But where the lessor does not require compensation from him, it is not necessary that it should be demanded by

the notice, even though, as has just been seen, the section provides that the lessee must be required "in any case" to make compensation for breach of his obligation (*Lock v. Pearce*, [1893] 2 Ch. 271). The service of the notice will be sufficient if it be left at the last known place of abode or business in the United Kingdom of the lessee, or if it be affixed or left for him on the land or any house or building comprised in the lease, or if it be sent by post in a registered letter addressed to him at his place of abode or business, such letter not being returned through the Post Office undelivered (s. 67, subss. 3, 4). It was decided under the Act of 1881 that neither a sum paid by the lessor to his solicitor for preparing the notice, nor a sum paid by him to his surveyor for a survey of the dilapidations, could be claimed as part of the reasonable compensation in money to the satisfaction of the lessor provided for by the Act, these expenses arising not immediately from the breach of covenant by the lessee, but from the fetter imposed by the wisdom of the Legislature on the enforcement of the cause of action arising from that breach (*Skinnners' Company v. Knight*, [1891] 2 Q. B. 542, per Fry, L.J.). This case is also an authority for saying that the obligation of the lessee under the statute to make compensation, though expressed in very wide terms, does not apply where there is nothing for which compensation can be made, the provision not being one absolute in its character. But, so far as the fees of the solicitor and surveyor are concerned, the amending Act of 1892 (55 & 56 Vict. c. 13) now provides in terms that the lessor shall be entitled to recover, in addition to damages, if any, all reasonable costs properly incurred by him in their employment, if such employment be in reference to any breach giving rise to a forfeiture from which the lessor is relieved under the provisions of the Conveyancing Acts (s. 2). But, with reference to this last provision, it has been decided that it only applies where the lessee is actually relieved by the Court in the manner to be presently mentioned (under subs. 2 of sec. 14 of the Act of 1881), and not to the case where, by complying with the notice under subs. 1, he prevents the right of forfeiture from becoming enforceable (*Nind v. Nineteenth Century Building Society*, [1894] 2 Q. B. 226).

The special provision as to relief contained in subs. 2 of sec. 14 of the Conveyancing Act, 1881, is as follows: "Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit, and, in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit."

Two ways are here indicated in which the lessee can obtain relief. First, an independent application, which, if made, should be made to the Chancery Division (see sec. 69), or an application "in the lessor's action," which will be made in the Division, usually the Queen's Bench, where the action to enforce the forfeiture is brought. In the former case the application, it seems clear, cannot be entertained by a County Court, although no doubt the provisions of sec. 14, subs. 1, imposing a fetter on the right of lessors to enforce forfeiture till compliance with its requirements has been made, will apply to those Courts; but where the lessor is proceeding in ejectment in the County Court, it seems probable that the

lessee has a right to apply to that Court for relief, as being an application "in the lessor's action" within the meaning of the provision now dealt with (see *Judicature Act, 1873, s. 89*). The application for relief, if not made in the lessor's action, must be made by writ of summons in the ordinary manner, and not by originating summons (*Lock v. Pearce, [1893] 2 Ch. 271*). If made in the lessor's action, in the Queen's Bench Division, it should be made by summons (*Burt v. Gray, [1891] 2 Q. B. 98*). It may be apparently made at any time until actual re-entry by the landlord has taken place (*Rogers v. Rice, [1892] 2 Ch. 170*), and even then the right to relief is not lost if proceedings to obtain it should have been initiated before that time (*Lock v. Pearce, supra*). Where an action of ejectment is brought against the tenant the relief will not be refused on the mere ground that it may not have been claimed by pleading (*Mitchison v. Thomson, 1883, C. & E. 72*); whilst, on the other hand, the relief may be refused where the circumstances of the case seem to require it, even though the landlord may not have complied with the requirements of subs. 1 (*Scott v. Brown, 1884, 51 L. T. 746*). The terms upon which relief will be granted are, as has been seen, entirely in the discretion of the Court, and a tenant has been made, as a condition for obtaining it, to bear all the landlord's costs of an action of ejectment as between solicitor and client, including those which he has incurred to his surveyor (*Bridge v. Quick, 1892, 67 L. T. 54*).

A lease for the purposes of the section includes an original or derivative underlease, and a lessee and a lessor include an original or derivative underlessee or underlessor, and the heirs, executors, administrators, and assigns of the lessee or lessor (subs. 3). It has, however, been several times decided that, as between himself and the head landlord, an underlessee is not within the Act, and this whether the underlease be of the whole of the premises included in the lease or not (*Creswell v. Davidson, 1887, 56 L. T. 811; Burt v. Gray, supra; Nind v. Nineteenth Century Building Society, [1894] 2 Q. B. 226*). In consequence of these decisions, it has been provided by the Act of 1892 (s. 4) that where a lessor is proceeding to enforce a forfeiture, the underlessee may apply, either in the lessor's action or in any action brought by himself for the purpose, for an order vesting in himself for the whole term of the lease, or any part of it, the property, or any part of it, on such conditions as the Court may deem fit; though in no case is he to be entitled to require a lease for a longer term than he had under his original sublease. Where the lessor's action of ejectment is brought against the underlessee, or he is made a party thereto, he has been held entitled to raise his claim to a vesting order under this provision by way of defence and counter-claim against the lessor (*Cholmeley's School v. Sewell, [1893] 2 Q. B. 254*). Although by sec. 1 of the Act of 1892 the two Acts are to be read together, it has been held that the above section applies even though the lessor is seeking to enforce a forfeiture for a breach of one of those obligations which, as will be presently seen, lie outside the scope of the earlier Act (s.c., *[1894] 2 Q. B. 906; Imray v. Oakshette, [1897] 2 Q. B. 218*). The underlessee, however, will not be permitted to avail himself of the benefit of the above section, unless he can show that he has not been guilty of omitting any precautions which a reasonable person might be expected to use (*Imray v. Oakshette, supra*).

The Act of 1892 further provides that the word "lease" (s. 5), both as used in that Act and in the Act of 1881, is to include an agreement for a lease where the lessee has become entitled to have his lease granted. It seems altogether uncertain what is the precise meaning to be attached to this

provision. Before it was passed it had been held that the Act of 1881, though it applied to an agreement as to which specific performance would be given apart from it, did not apply to one where that relief would be withheld (*Coatsworth v. Johnson*, 1886, 55 L. J. Q. B. 220; *Swain v. Ayres*, 1888, 21 Q. B. D. 289; *Strong v. Stringer*, 1889, 61 L. T. 470). Possibly, as has been suggested, the word "entitled" should be read as meaning "entitled but for the forfeiture sued upon"; and possibly it was intended that tenants under agreements should be placed in all respects in the same position as those under leases. If the latter be not the case, the law would appear to remain unchanged; and although a tenant holding under a lease is clearly entitled to the benefit of the provisions of the Acts, with tenants under agreement it is different, inasmuch as the effect of the rule in equity has always been to prevent them from obtaining specific performance, from the mere fact of having committed the breach upon which it is sought to enforce forfeiture (see SPECIFIC PERFORMANCE). There are, however, certain exceptional cases, where there has been either fraud, mistake, or accident, where specific performance is obtainable apart from the Acts, and in such cases the tenant under an agreement would be entitled to the benefit of the statutes.

The 14th section of the Act of 1881 is not to extend to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased, or to a condition for forfeiture on the lessee's bankruptcy, or on the taking in execution of his interest (subs. 6). But as regards the case of bankruptcy and execution, the Act of 1892 in effect provides that the restriction on the power of the Court to grant relief is only to apply after the expiration of a year from the date of the bankruptcy or execution, and not at all if the interest of the lessee be sold within that year (Act of 1892, s. 2, subs. 2). This, however, is not to apply to any lease of agricultural or pastoral land, of mines or minerals, of public-houses or beershops, of houses let as dwelling-houses, with the use of any furniture, books, works of art, or other chattels not in the nature of fixtures, and of any property with respect to which the personal qualifications of the tenant are of importance for the preservation of its value or character, or on the ground of neighbourhood to the lessor or to any person holding under him.

By the Conveyancing Act, 1881 (s. 14, subs. 8), the law relating to re-entry or forfeiture or relief in case of non-payment of rent is unaffected by the provisions of the section. This matter is accordingly still regulated by the provisions of the Common Law Procedure Act. The 210th section of the Common Law Procedure Act, 1852, dispensing under certain conditions with the necessity for a demand before re-entry for non-payment of rent can take place, has already been dealt with. It goes on to provide that if the lessee or his assignee or any other person claiming under him suffers judgment and execution in such ejectment without paying the rent and arrears, together with full costs (see *Croft v. London and County Banking Co.*, 1885, 14 Q. B. D. 347), he or they shall be barred of all right to relief where no proceedings to obtain such relief in equity are commenced within six months. It is conceived that in the group of sections now dealt with the action of ejectment referred to throughout is an action where half a year's rent is in arrear, and a right of re-entry is reserved to the lessor in the event of non-payment; but it would seem that the additional requirement of want of sufficient distress necessary, as has been seen, before a demand can be dispensed with, is not necessary as regards the other provisions contained in these sections (*Roe v. Davis*, 1806, 7 East, 363). This part of the 210th section is obviously of a disabling nature, so that it would seem clear

that a tenant is not necessarily entitled to relief if he apply for it within the six months prescribed by the section. The granting or refusal of relief within that period will depend principally on the question whether at the time the application for it is made the position of the parties has been changed. If there has been no substantial change in the position of the landlord, relief, as a rule, will be granted (*Newbolt v. Bingham*, 1895, 72 L. T. 852); where the contrary is the case, it will in general be refused (*Stanhope v. Haworth*, 1886, 3 T. L. R. 34). The 211th section of the Common Law Procedure Act, 1852, is also framed negatively, and is to the effect that if the lessee or assignee shall apply for relief within the prescribed six months, he shall not have an injunction against the proceedings at law in ejectment, unless within forty days after the lessor has put in a defence to the tenant's application he pays into Court the rent and taxed costs of the action of ejectment.

By sec. 212, if the lessee, his executors, administrators, or assigns obtain the relief applied for, he or they are to have the premises restored to them without the grant of any new lease being necessary. This provision has been held to extend to cases where the lessor, instead of suing in ejectment, has availed himself of his common law right to retake peaceable possession of the premises (*Howard v. Fanshawe*, [1895] 2 Ch. 581). Where the application for relief under the above section is made by a person other than the lessee, the latter must be made a party to it, and in his absence it will not succeed (*Hare v. Elms*, [1893] 1 Q. B. 604). The application may now be made by summons to a Court or judge in the Queen's Bench Division, which has power to grant relief in a summary manner on the same terms as those which may be granted by Courts of equity under the above provisions (Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 1). This section has been held not to apply when the landlord has actually re-entered, for it requires that an action of ejectment should have been brought (*Wilson v. Bolton*, 1893, 10 T. L. R. 17). Moreover, before the trial in ejectment takes place the tenant or his assignee may, at any time, pay or tender to the lessor, or pay into Court, the arrears of rent and costs, and if he do, the 212th section expressly provides that all further proceedings in the action of ejectment are to be discontinued. This power has been held to be exercisable even by an underlessee (*Doe v. Byron*, 1845, 1 C. B. 623).

*Waiver.*—Breach of a condition in a lease or breach of a covenant to which a proviso of re-entry applies, does not, as already seen, *ipso facto* put an end to the lease, the effect being simply to vest in the lessor the choice of putting an end to it, or allowing it to continue. It has also been mentioned that if he elect to adopt the former course, he must do some act notifying unambiguously his intention to the lessee; for the present we confine our attention to the case where the lessor decides, in spite of the act of forfeiture, not to put an end to the tenancy. This case is generally referred to as that of "waiver" of a forfeiture. There are two statutory enactments relating to the subject. The earlier is to the effect that waiver is not in the absence of an intention appearing to the contrary to extend to any breach other than that to which it specially relates (23 & 24 Vict. c. 38, s. 6). The other is that a lessor shall be entitled to recover as a debt due to him from the lessee, and in addition to damages, if any, all reasonable costs and expenses properly incurred by him in the employment of a solicitor and surveyor in reference to any breach giving rise to for-

feiture which, at the request of the lessee, is waived by the lessor by writing under his hand (55 & 56 Vict. c. 13, s. 2).

The general principle may be stated to be that any act on the part of the lessor, after he has gained knowledge of the act of forfeiture, indicating a clear election to regard the tenancy as still on foot, is evidence from which the inference may be drawn of an intention to waive the forfeiture. Such evidence is always capable of rebuttal (see *Thomas v. Lulham*, [1895] 2 Q. B. 400). The most ordinary manner in which a forfeiture is waived is by acceptance of rent—either voluntarily paid by the tenant, or recovered *in invitum* against him by distress. Where rent is paid by, and accepted from, the tenant, such rent in order to work a waiver must be rent due subsequently to the forfeiture (*Price v. Worwood*, 1859, 4 H. & N. 512). But where rent is paid under a distress, it makes no difference whether it be due before or after the forfeiture, for after a tenancy has been determined by forfeiture a distress is illegal (*Grimwood v. Moss*, 1872, L. R. 7 C. P. 360; *Kirkland v. Briancourt*, 1890, 6 T. L. R. 441). There are, however, many other acts which may have the same effect by force of the general principle; for instance, where the lessor, instead of distraining, brings an action for rent accruing after the forfeiture (*Dendy v. Nicholl*, 1858, 4 C. B. N. S. 376), or even where he merely makes an unqualified demand upon the tenant for such rent (*Doe v. Birch*, 1836, 1 Mee. & W. 402; cp. *Penton v. Barnett*, cited *infra*).

In the case of those covenants (e.g. the covenant to keep in repair) the breach of which is necessarily of a continuing nature, it is important to notice that acts of a description similar to those which have just been mentioned will have the effect of waiving the forfeiture *only down to the time at which the tenancy is affirmed thereby to exist*. Thus where the act relied upon is the acceptance of rent, no breach at a time subsequent to the day upon which the rent which is received falls due is thereby waived (*Doe v. Jones* 1850, 5 Ex. Rep. 498); unless the acceptance of rent takes place under circumstances which show that the intention amounted not merely to a waiver of past breaches, but to a licence to continue the breach in future (*Griffin v. Tomkins*, 1880, 42 L. T. 359). Difficulties in reference to this matter often arise in connection with the notice which, as already seen, has to be given before a forfeiture can be enforced under the Conveyancing Act. It has been held (in the case of breach of repairing covenants) that if rent which falls due while such notice is running be accepted after the expiration of the notice, no waiver can be inferred in the event of subsequent non-repair (*Cronin v. Rogers*, 1884, C. & E. 348). This is in harmony with the old-established rule that where a lease contains a general covenant to repair with a proviso for forfeiture on non-repair after a notice from the lessor of agreed length, acceptance of rent falling due during the running of the notice is not a waiver (*Doe v. Brindley*, 1832, 4 Barn. & Adol. 84). Nor does it make any difference even that the rent, payment of which is accepted by the lessor, is rent which has fallen due after the expiration of the notice under the Conveyancing Act. Hence, where a landlord gave such a notice on the 22nd September to remedy breaches of repair within three months, it was held that the requirements of the notice not having been complied with, the lessor might issue a writ in ejectment upon its expiration, and that a demand in such writ for the rent due at Christmas, as rent, was no waiver of the forfeiture (*Penton v. Barnett*, [1898] 1 Q. B. 276). So where a lease contains a general covenant to repair, and a special covenant to repair after a notice of specified length, a notice to repair within the time mentioned in the special covenant, though a

waiver of the forfeiture under the general covenant, as being equivalent to an admission that the tenancy will continue up to that time (*Doe v. Meux*, 1825, 4 Barn. & Cress. 606; 28 R. R. 426), may be supplemented by a second notice under the general covenant given in order to satisfy the requirements of the Conveyancing Act (*Cove v. Smith*, 1886, 2 T. L. R. 778).

If the lessor desires to take advantage of the forfeiture he must, as already seen, issue a writ in ejectment; but once he has issued and served his writ, he cannot draw back, as his decision to determine the tenancy is irrevocable. It follows that none of the steps which have already been alluded to as furnishing evidence of a waiver can in such a case be relied upon, e.g. acceptance of rent (*Doe v. Meux*, 1824, 1 Car. & P. 346), or a distress made to recover it (*Grimwood v. Moss*, 1872, L. R. 7 C. P. 360). If, however, the writ in ejectment should go on to ask for a remedy which is inconsistent with the claim for possession, as, for instance, where it asks for an injunction restraining the breach which has given rise to the forfeiture, the effect of an act of the kind already mentioned may be to waive the forfeiture (*Evans v. Davis*, 1878, 10 Ch. D. 747). And the mere issue of the writ is only an irrevocable determination to determine the particular tenancy under which the forfeiture was incurred; so that if subsequent rent be paid and accepted, a new tenancy from year to year, on the terms so far as applicable of the former, would be inferred (*Evans v. Wyatt*, 1880, 43 L. T. 176). It may be added that if the lessor, instead of issuing a writ in ejectment, lies by upon a forfeiture being incurred, he will not disable himself from subsequently enforcing it, as some positive act has been held to be necessary on his part for the inference of a waiver to be drawn (*Doe v. Allen*, 1810, 3 Taun. 78; 12 R. R. 597; *Bracebridge v. Buckley*, 1816, 2 Price, 200; *Perry v. Davis*, 1858, 3 C. B. N. S. 769). But expenditure of money upon the premises by the tenant to the knowledge of the landlord might have the effect of causing a waiver as raising an equity against the latter.

The law as to *Agricultural Holdings* is dealt with under TENANT-RIGHT.

[*Authorities*.—Woodfall's *Landlord and Tenant*, 15th ed., 1893; Redman and Lyon, *Landlord and Tenant*, 4th ed., 1893; Foà's *Landlord and Tenant*, 2nd ed., 1895; Leake on *Contracts*, 3rd ed., 1892; Smith's *Leading Cases* (Notes to), 10th ed., 1896.]

**Land-man**—A terre-tenant, i.e. a person actually in possession and enjoyment of land.

**Land not settled**.—A testator's reversion in fee in settled lands passes under a devise of his "lands not settled" (1 Jarman, *Wills*, 5th ed., 616).

**Land of a Like Quality**.—Where by a canal company's special Act it was provided that the lands of the company, whether covered with water or not, should be charged and assessed "in like manner as lands of a like quality" (provision being made separately for the assessment of all buildings of the company), it was held that the canal and towing-path should be rated in like manner as land of a like quality in the parish,—that is to say, as open land which never could be built upon, but which might perhaps have some enhanced value from its proximity to the canal and

adjoining buildings, as applicable to any purpose except building purposes (*Regent's Canal Co. v. St. Pancras*, 1877, 47 L. J. M. C. 37).

**Land-reeve**—A subordinate officer on large landed estates who acts as assistant to the land steward.

**Land Registry.**—See REGISTRATION OF DEEDS.

**Land Revenues of the Crown.**—See CROWN, LAND REVENUES OF.

## Lands Clauses Acts.

### TABLE OF CONTENTS.

PRELIMINARY . . . . .	265	Jurisdiction . . . . .	279
SCOPE OF INCORPORATING ACTS . . . . .	267	Enforcing Award . . . . .	279
National Purposes . . . . .	267	MEASURE OF COMPENSATION . . . . .	280
Local Purposes . . . . .	268	For Lands taken . . . . .	280
Commercial Purposes . . . . .	269	" injuriously affected . . . . .	281
THE LANDS CLAUSES ACT, 1845 . . . . .	269	For Minerals . . . . .	282
Subdivisions . . . . .	269	LANDS SUBJECT TO PARTICULAR	
Definitions . . . . .	270	INCIDENTS . . . . .	282
WHAT LANDS MAY BE TAKEN . . . . .	271	Copyholds . . . . .	282
ACQUISITION BY AGREEMENT . . . . .	272	Commons and Wastes . . . . .	283
COMPULSORY ACQUISITION . . . . .	273	Mortgaged Lands . . . . .	283
Notice to Treat . . . . .	274	Rent-Charges . . . . .	283
TRIBUNALS FOR ASSESSING PRICE,		Leased Lands . . . . .	284
ETC. . . . .	276	Omitted Interests . . . . .	284
Surveyors . . . . .	276	COMPENSATION FOR RATES AND TAXES	284
Justices . . . . .	277	CONVEYANCE . . . . .	284
Arbitrators . . . . .	277	PAYMENT INTO COURT . . . . .	284
Juries . . . . .	278	COSTS . . . . .	285
Other special Tribunals . . . . .	279	Superfluous Lands . . . . .	286

**PRELIMINARY.**—In theory the Crown has the prerogative of expropriating the lands of subjects for the purposes of the defence of the realm, but no more (*A.-G. v. Tomline*, 1879, 12 Ch. D. 214). See EMINENT DOMAIN.

Apart from this almost effete prerogative, interference by the officers of the Crown with the lands of subjects exposes such officers, as individuals, to action by the owner or occupier of the lands invaded (*Raleigh v. Goschen*, [1898] 1 Ch. 73), although it does not justify an action against the trespassers as officials of the Crown, or against any branch of the Executive Government, if it be framed so as to suggest direct liability to compensation out of the public monies, and though, being a tort, it cannot be made the subject of a petition of right (*Feather v. R.*, 1865, 6 B. & S. 257).

It may be taken as an established constitutional rule that, apart from overriding national necessity, private property can never be confiscated, without payment to the owner of its value (*Couper Essex v. Atton L. B.*, 1889, 14 App. Cas. 153, 177; and see *Walker v. Baird*, [1892] App. Cas. 491). And inasmuch as the executive must come to Parliament for the money to buy or execute works on private land, such interference is always effected under the authority of Parliament.

No public or private corporation or private person has any legal right to expropriate, with or without compensation, the lands of another without



the sanction of Parliament or his own consent. And it is for this reason that it is necessary (1) to obtain private Acts to authorise the carrying out of schemes which involve interference with any right of private ownership, or in those cases in which departments of State may make provisional orders as to public improvements, or such commercial undertakings as electric lighting, tramways, or light railways, to have such orders confirmed by Parliament when compulsory powers to take land are given. It is an established practice of Parliament not to allow a private Bill to be passed when its objects can be adequately attained under the common law, or existing general, or local, or private Acts; and the preamble of all private Bills must contain, and the promoters must prove, the recital "whereas the objects, etc., cannot be attained without the authority of Parliament." The Clauses Consolidation Acts of 1845 and 1847 were passed in consequence of the defects and abuses of parliamentary procedure on private Bills disclosed by the report of a Select Committee appointed in 1844. Up till then every special Act had to be self-contained, and comprised a large number of common form clauses combined with special clauses peculiar to the particular undertaking. And it was reported that in order to diminish the bulk of the special Acts, and to ensure precision, brevity, and uniformity, the common and indispensable clauses should be classified in general Acts, and incorporated by reference in the special Act (Clifford, *Private Bill Legislation*, vol. i. p. 102, vol. ii. p. 524). This purpose is stated in the preamble of the Act of 1845, which for some unexplained reason has been subjected to statute law revision. The effect of the change in procedure, as pointed out by Mr. Clifford (ii. 530), was, in the case of railways, to reduce the bulk of these special Acts from 100 pages to 10 by incorporating the Companies, Lands, and Railways Clauses Acts; and the care with which the Lands Clauses Act, 1845, was drafted is shown by the fewness of the amendments in the Act which have since been needed, and of the exceptional provisions introduced into special Acts for the taking of lands.

The general name "Lands Clauses Acts" was given by statute (52 & 53 Vict. c. 63, s. 23), in accordance with a nomenclature already adopted in practice, to the following statutes:—

The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

The Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106).

The Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18).

The Lands Clauses (Umpire) Act, 1883 (46 Vict. c. 15); and

The Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11).

All these statutes are read together as parts of a single code (*R. v. Lord Mayor of London*, 1867, L. R. 2 Q. B. 292). But none of them has any independent existence or statutory force apart from some other general or special Act authorising the purchase or taking of lands for purposes of a public, or quasi-public, or commercial character (*Dartford Rural District Council v. Beasley Heath Rwy. Co.*, [1898] App. Cas. 210). When any Act passed since 1845 authorises such purchase or taking, the Lands Clauses Acts, so far as applicable to the particular undertaking, are automatically incorporated with the Act, unless specifically varied or excepted wholly or in part (1845, s. 1); but it is usual to incorporate them specifically either *in toto* or with modifications and exceptions, *e.g.* by excluding the compulsory powers. And railway companies possessed of Acts prior to 1845 who have since then sought increased powers have been required, as a condition

of the parliamentary concession, to incorporate the Lands Clauses Acts with their earlier Act (*L. & Y. Ry. Co. v. Evans*, 1851, 15 Beav. 322).

**SCOPE OF INCORPORATING ACTS.**—The provisions as to the incorporation of the Lands Clauses Acts apply to all Acts authorising the purchase of lands, whether general or local.

Such Acts fall into three classes:—

1. Acquisition of lands for purposes of national defence or general government.

2. Acquisition of lands for public purposes of a local or municipal character.

3. Acquisition of lands by corporations or individuals for commercial purposes of public utility.

Where the incorporating Act is a public Act, the provisions as to access to the special Act, insisted on in the case of local and personal Acts (ss. 150, 151), are excluded, and the regulations as to bonds on entry upon lands before the final assessment of compensation, and as to the subscription of the necessary capital (ss. 16, 17, 85), are also either excluded as inappropriate, or modified.

1. *National Purposes.*—*Defence.*—The *War Department* may acquire land for the following purposes:—

Ordnance service, War Department or defence of realm.

Defence of arsenals or dockyards (23 & 24 Vict. c. 112).

Depôt centres, metropolitan exercising grounds, tactical training stations, barracks, camps, etc. (35 & 36 Vict. c. 68; 53 & 54 Vict. c. 25).

Military purposes generally, including those of volunteer corps (55 & 56 Vict. c. 43).

Military tramways (50 & 51 Vict. c. 65, s. 5).

Certain of the Defence Acts prior to 1845 provide a procedure for taking lands other than that set out in the Lands Clauses Acts. That of 1842 (5 & 6 Vict. c. 94) provides (s. 23) that compulsory powers are not to be exercised unless (1) the necessity or expediency of their exercise as to particular lands is certified by the lord lieutenant or two deputy lieutenants of the county in which the lands lie, and authority to take is given by the Treasury; or unless (2) an enemy has actually invaded the realm.

The Defence Act, 1854, applies (at the option of public officers), to proceedings for taking lands for the defence of the realm or for ordnance or barrack services, the procedure under the Lands Clauses Acts. The Defence Act, 1860, provides a similar but not identical procedure. The Ranges Act, 1891 (c. 54, s. 11), empowers the acquiring authority to insist on arbitration in lieu of a jury. The Military Lands Act, 1892 (55 & 56 Vict. c. 43), incorporates the Lands Clauses Acts.

The *Admiralty* can acquire lands by agreement for the naval service, or the use or requirements of any force or department in the employment or under the control of the Admiralty: subject to the Lands Clauses Acts, except the part referring to compulsory taking (27 & 28 Vict. c. 57, ss. 3, 4).

They can acquire lands compulsorily or by agreement for the purposes of the Naval Works Act, 1895 (58 & 59 Vict. c. 35), or for any purpose of the navy. The powers and procedure are the same as under the Defence Acts, and the Military Lands Act, 1892, except that the Admiralty is substituted in the Acts for a Secretary of State, and the officers of Ordnance, or the Ordnance Department, and "naval" for "military". This appears to give the Admiralty the power, possessed by the Secretary of

State for War, to use all the powers given to promoters under the Lands Clauses Acts (23 & 24 Vict. c. 106, s. 7).

They have also power to acquire lands compulsorily under special Acts, into which the Lands Clauses Acts must be read as incorporated, subject to the following modifications:—They are not required to give a bond, but may substitute an undertaking (27 & 28 Vict. c. 57, s. 21). A notice to treat may be withdrawn within two months of being given (s. 6). The powers must be exercised within five years of the passing of the special Act, and not three, as under the Lands Clauses Acts (s. 8), and the provisions of secs. 9, 10 of the Railways Clauses Act, 1845, as to correcting plans are applied (s. 7). A list of the special Acts is given in Appendix IV. to the Official Index to the Statutes (13th ed.). They are printed among the public general Acts.

The Admiralty can sell surplus lands acquired under their powers. They are not subject to the provisions of the Lands Clauses Acts as to superfluous lands, except as to pre-emption (27 & 28 Vict. c. 57, ss. 15–18), but are subject to the provisions as to omitted interests (27 & 28 Vict. c. 57, s. 19).

Their powers include a right to take land for signal stations (55 Geo. III. c. 128) and coastguard stations (19 & 20 Vict. c. 83). Powers for the acquisition of lands for signal stations and telegraphic purposes are given to Lloyd's in the interests of merchant shipping, subject to the control of the Board of Trade (51 & 52 Vict. c. 29). The Act incorporates most of the Lands Clauses Acts, but compulsory powers are acquired only by Provisional Order of the Board of Trade confirmed by Parliament (s. 3 (7)); and a similar power for like purposes is, by sec. 639 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), given to the Trinity House as lighthouse authority.

*Customs.*—The Customs Department can acquire lands, compulsorily or otherwise, for its purposes under 16 & 17 Vict. c. 107 (ss. 335–345); 39 & 40 Vict. c. 36 (ss. 275, 276); and 42 & 43 Vict. c. 36.

*Other Matters of General Government.*—*Post Office.*—The Postmaster-General can take lands for the service of the Post Office, but not compulsorily, without the sanction of Parliament (44 & 45 Vict. c. 20).

*Prisons.*—Land for the purposes of prisons may be acquired by a Secretary of State under the Prison Acts, 1865 (28 & 29 Vict. c. 126, ss. 44, 45, 47, 49) and 1884 (47 & 48 Vict. c. 51).

*Public Buildings.*—Lands for the purposes of public buildings not falling within any of the above heads are acquired by the Commissioners of Public Works and Buildings under special Acts authorising the expenditure of the necessary money, and usually incorporating the Lands Clauses Acts, e.g. the Public Offices (Westminster and Whitehall) Site Acts of 1896 and 1897 (59 & 60 Vict. c. 23; 60 & 61 Vict. c. 27), which incorporate the Lands Clauses Acts, with modifications. They also contain special clauses for extinguishing, subject to compensation, all rights-of-way, or of laying down or continuing any pipes, sewers, or drains through or under any land acquired, and all rights or easements affecting the land (59 & 60 Vict. c. 23, s. 5). • The other Acts on this subject are collected in Appendix VIII. to the official digest to the statutes (13th ed.).

2. *Public Purposes of a Local Character.*—(a) Public health and local government.

(1) Under Public Health Acts (38 & 39 Vict. c. 55, ss. 175, 176, 308, 332; 46 & 47 Vict. c. 37).

(2) For the purposes of the Local Government Acts, 1888 and 1894

(51 & 52 Vict. c. 41, s. 65; 56 & 57 Vict. c. 73, s. 9), and the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 107). See TOWN GOVERNMENT.

(3) For widening and improving highways, and for town improvements. See the Towns Improvement Clauses Acts; and as to London, Michaelangelo Taylor's Act (57 Geo. III. c. 29) and the Metropolis Local Management Acts. See LONDON (COUNTY).

(4) For housing the working classes (53 & 54 Vict. c. 70).

(5) For allotments and small holdings (56 & 57 Vict. c. 73, ss. 8, 9).

(b) For enclosures, commons, and open spaces.

(c) For church building (58 & 59 Geo. III. c. 45, s. 52).

(d) For land drainage for agricultural purposes and to prevent floods (3 & 4 Will. IV. c. 22; 24 & 25 Vict. c. 133). See SEWERS.

(e) For elementary and technical education (33 & 34 Vict. c. 75, s. 20; 55 & 56 Vict. c. 29).

3. *Commercial Purposes of Public Utility*.—Under this head fall the bulk of the special, local, and personal Acts which incorporate the Lands Clauses Acts. They fall into the following main clauses:—

(1) Cemeteries.

(2) Electric lighting, effected by provisional orders confirmed by statute.

(3) Gasworks.

(4) Harbours.

(5) Markets and fairs.

(6) Waterworks.

(7) Railways and Light Railways.

(8) Tramways.

In all but the last two cases these undertakings can, under general Acts, be intrusted to municipal bodies, and in the case of tramways a local authority can, in certain events, acquire and work tramways. See TOWN GOVERNMENT; TRAMWAYS.

THE LANDS CLAUSES ACT, 1845.—*Subdivisions*.—The Act of 1845 is divided by cross-headings into several portions, each of which may be incorporated with, or excepted from, a special Act by enacting that the clauses with respect to the matters described in the introductory heading to a portion shall be incorporated or excepted (1845, s. 5). This incorporation or exception, if effected by reference to the introductory headings, includes or excludes all the sections in the *fasciculus*; but not sections in another *fasciculus* relating to the same subject-matter (*Broadbent v. Imperial Gas Co.*, 1859, 7 H. L. 660; *R. v. Lord Mayor of London*, 1867, L. R. 2 Q. B. 292; *Kirby v. Harrogate L. B.*, [1896] 1 Ch. 437).

The cross-headings are:—

Purchase of Lands by Agreement (ss. 6–15).

Purchase of Lands otherwise than by Agreement (the portion oftenest excepted) (ss. 16–68).

Application of Compensation (ss. 69–80).

Conveyances (ss. 81–83).

Entry on Lands (ss. 84–92).

Intersected Lands (ss. 93, 94).

Copyholds (ss. 95–98).

Common Lands (ss. 99–107).

Lands on Mortgage (ss. 108–114).

Rent-Charges (ss. 115–118).

Leases (ss. 119–122).

Interests omitted to be purchased (ss. 124–126).

Sale of Superfluous Lands (ss. 127–132).

Deficiency in Rates and Land Tax (s. 133).

Service of Notices (s. 134).

Tender of Amends (s. 135).

Recovery of Penalties (ss. 136–149).

Access to Special Act (ss. 150, 151).

The subdivision, while convenient for purposes of incorporation, must not be understood to be complete for purposes of reference, *i.e.* the different *fasciculi* are not absolutely complete in themselves as to the topic with which they deal.

*Definitions.—Lands within the Acts.*—The definition of “lands” in the L. C. Acts (1845, s. 3) extends to messuages, lands, tenements, and hereditaments, corporeal or incorporeal, of any tenure, *i.e.* of whatever tenure if any, and so includes easements; but the operative sections give no power to take an easement compulsorily. This power depends on the express terms of the special Act (*G. W. Rwy. Co. v. Swindon, etc., Rwy. Co.*, 1884, 9 App. Cas. 787). But interference with easements entitles the owner of the dominant tenement to compensation under sec. 68 of the Act (*Clarke v. London School Board*, 1874, L. R. 9 Ch. 120). This definition of lands excludes (1) tithes and ordinary tithe rent-charge (*R. v. Nene Outfall Commissioners*, 1829, 9 Barn. & Cress. 875), but not the statutory tithes of the city of London (*Esdaile v. Met. A. & District Rwy. Co.*, 1881, 46 J. P. 103); and (2) rights of shooting not involving any interest in the land shot over (*Bird v. G. E. Rwy. Co.*, 1865, 34 L. J. C. P. 366). It does include mines, subject to the special provisions usually incorporated from the Railways Clauses Acts (*Errington v. Met. District Rwy. Co.*, 1882, 19 Ch. D. 559). See below, p. 282.

Easements fall within the definition of land in the Lands Clauses Acts, 1845 (ss. 3, 6), so far that the promoters can extinguish them subject to compensation; but the procedure for ascertaining the compensation is under sec. 68 for injuriously affecting the dominant tenement, and the promoters cannot be compelled to purchase the easement before interfering with it (*Clarke v. London S. B.*, 1874, L. R. 9 Ch. 120).

A similar rule applies to the taking of streams or the mere interference with easements of riparian owners or others under the Waterworks Clauses Act, 1847 (*Stone v. Yeovil (Mayor)*, 1876, 2 C. P. D. 99; *Bush v. Trowbridge W. W.*, 1875, L. R. 10 Ch. 459; *Page v. Kettering W. W.*, 1892, 8 T. L. R. 228).

The promoters cannot compulsorily obtain the creation of an easement under the L. C. Acts (*G. W. Rwy. Co. v. Swindon, etc., Rwy. Co.*, 1884, 9 App. Cas. 787; *Hill v. Midland Rwy. Co.*, 1882, 21 Ch. D. 143). Such power can only be given by particular clauses in the special Act (see *Hill v. Midland Rwy. Co.*, 1882, 21 Ch. D. 143; *Metrop. Rwy. Co. v. Fowler*, [1893] App. Cas. 416; *Kirby v. Harrogate S. B.*, [1896] 1 Ch. 437).

*Promoters.*—The persons entitled to take lands are termed “promoters of the undertaking,” *i.e.* the corporations or persons to whom a general or special Act incorporating the L. C. Acts gives authority to take lands (1845, s. 2) (*In re Edmeade's Estate*, 1860, 8 W. R. 327).

*Owners.*—Those persons are owners of land who, under the L. C. Acts or the special Act, are authorised to sell and convey lands to the promoters, *viz.* besides ordinary persons, all corporations, tenants in tail or for life of settled land, even where the lands were settled by statute (*In re Cuckfield Burial Board*, 1855, 19 Beav. 153); trustees and executors where the beneficial owners are under disability, and guardians and committees of idiots.

lunatics, subject in the latter case to the leave of the Judge in Lunacy (53 & 54 Vict. c. 5, s. 120, *a*). The scheme of the Acts is that persons beneficially interested and not under disability must be dealt with by the promoters (*Peters v. Lewes, etc., Rwy. Co.*, 1881, 18 Ch. D. 429). The disabilities which attached to married women in 1845 have since disappeared, and while married women seised of land in their own right or entitled to dower were specifically authorised to contract (*In re Drummond and Davie's Contract*, [1891] 1 Ch. 524), now both they and women having property settled to their separate use can deal independently of trustees. But in each case where a conveyance is taken the legal as well as the equitable owners must join.

The only lands which may be taken are those authorised by the special Act. In the case of public Acts with which the Lands Clauses Acts are incorporated, no deposited plans are necessary, and any lands may be taken which are required for the purposes of the general Act; and the powers of such Acts are construed more liberally in the public interest than those in special Acts for commercial undertakings (*Galloway v. London (Mayor)*, 1866, L. R. 1 H. L. 34).

WHAT LANDS MAY BE TAKEN.—In the case of a special Act no lands or easements can be taken unless required for the purposes of the undertaking (1845, s. 6); and those taken must be delineated on the deposited plans and described in the deposited book of reference, *i.e.* indicated with sufficient accuracy and detail so as to give clear notice to the landowner that his lands are required (*Protheroe v. Tottenham Rwy. Co.*, [1891] 3 Ch. 278; *Herron v. Rathmines Commissioners*, [1892] App. Cas. 498). Provision for correcting mistakes in description is usually made by incorporating sec. 7 of the Railways Clauses Act, 1845 (c. 20). But even with this proviso the terms of the special Act, except so far as it incorporates agreements made with landowners, are read strictly against the promoters whose language they are held to embody (*Simpson v. South Staffordshire W. W.*, 1865, 34 L. J. Ch. 380; *East London Rwy. Co. v. Whitchurch*, 1874, L. R. 7 H. L. 81).

The rule that lands may be taken only for the purposes of the undertaking is subject to the following apparent exceptions:—

(a) Land taken for temporary purposes during the execution of the works, if necessary, and for a purpose authorised by the special Act (*Morris v. Tottenham, etc., Rwy. Co.*, [1892] 2 Ch. 47).

(b) Small portions of land not situate in a town and not built on, which are intersected by the undertaking, not exceeding half an acre on either side, if the owner requires the promoters to purchase, unless the owner has other adjoining land with which the intersected part can conveniently be occupied; in which event the company must throw the intersected part into the adjoining land (1845, s. 93). The word "town" is used in its popular sense (*L. & S.-W. Rwy. Co. v. Blackmore*, 1870, L. R. 4 H. L. 610).

Where the expense of making communications between divided parts of intersected lands exceeds the value of the land, the promoters can insist on purchase, unless the owners have adjoining land and require the communication (1845, s. 94) (*Eastern Counties Rwy. Co. v. Marriage*, 1861, 9 H. L. 32).

(c) Lands required for extraordinary purposes may be required by the promoters by private treaty (1845, ss. 12–14) up to an amount stated in the special Act (1845, c. 20, s. 45) (*City of Glasgow Union Rwy. Co. v. Caledonian Rwy. Co.*, 1871, L. R. 2 H. L. Sc. 164).

(d) Under the Lands Clauses Act, 1845, the promoters may be required

to take the whole of a house or other building or manufactory, if they touch any part of it, even if they only require the part (s. 92). This merely follows with relaxation prior legislation on the subject (Clifford, ii. 525, n. 4).

This general provision has occasionally worked hardship on promoters (see *Brook v. M. S. & L. Rwy. Co.*, [1895] 2 Ch. 571), and is now varied or relaxed in many special Acts, especially with reference to underground railways, in which underpinning instead of purchase of the whole or part of a house is authorised; and the following special clause is now usually inserted in railway bills:—

“Notwithstanding sec. 92 of the Lands Clauses Consolidation Act, 1845, the owners of, and other persons interested in, the houses or other buildings or manufactories described in the schedule to this Act, and whereof parts only are required for the purposes of this Act, may, if such portions can, in the opinion of the jury, arbitrators, or other authority to whom the question of disputed compensation shall be submitted, be severed from the remainder of such properties without material detriment thereto, be required to sell and convey to the company the portions only of the premises required without the company being obliged or compellable to purchase the whole or any greater portion thereof, the company paying for the portions required by them and making compensation for any damage sustained by the owners thereof and any parties interested therein, by severance or otherwise.”

Provision is made for counter-notice by the owner that he contends that portion cannot be taken without material detriment, and if it is given within the prescribed time the question is referred to the tribunal selected for compensation.

The tribunal in deciding whether there would be material detriment from taking a portion only is entitled to take into account all the circumstances of the case, and the mode and manner in which the property is to be taken, including any offer which the company can lawfully make to provide adequate access to the part not proposed to be taken in lieu of access through the part taken (*In re Gonty and M. S. & L. Rwy. Co.*, [1896] 2 Q. B. 439; *Caledonian Rwy. Co. v. Turcan*, 1898, W. N. 18).

**ACQUISITION BY AGREEMENT.**—The purchase of lands by agreement is regulated by secs. 6–15 of the Act of 1845. These clauses are a statutory authority to the promoters to purchase and to the owners to sell any land needed for the general or for the extraordinary purposes of the undertaking, and in the case of purchase for extraordinary purposes to resell the land and to purchase other lands not exceeding the limit prescribed by the special Act. A municipal corporation cannot part with any of its lands to promoters except under the exercise of the compulsory powers or subject to the approbation of the Local Government Board, except in the case of lands which at the date of the special Act they could have disposed of without such assent (1845, s. 15; 45 & 46 Vict. c. 50, s. 108; 51 & 52 Vict. c. 41, s. 72; and see *Davis v. Leicester (Mayor, etc.)*, [1894] 2 Ch. 208). The consent of the Charity Commissioners is also needed to an agreement for the sale of charity lands (see *Finnis v. Forbes*, 1883, 24 Ch. D. 587; *In re Clergy Orphan Corporation*, [1894] 3 Ch. 145).

Such an agreement to bind the promoters of a corporation must be either under seal or executed in accordance with sec. 97 of the Companies Clauses Act of 1845; and in any event being for an interest in lands must be in writing.

If the owners are a corporation, their agreement for sale must, as a

general rule, be under seal (*Young v. Leamington (Mayor, etc.)*, 1883, 8 App. Cas. 67).

Where a notice to treat has been given as a preliminary step to exercising compulsory powers, it may be met by agreeing to sell and agreeing the price, or agreeing to sell subject to settlement of the price by arbitration, and such an agreement forms an enforceable contract irrespective of the Statute of Frauds (*Haynes v. Haynes*, 1861, 30 L. J. Ch. 578; *Watts v. Watts*, 1874, L. R. 17 Eq. 217; *Harding v. M. B. W.*, 1872, L. R. 7 Ch. 154), provided in the case of owners under disability, that the provisions of sec. 9 of the Act of 1845 as to valuation have been strictly complied with; since the owners being under disability cannot sell without complying with them and the promoters cannot waive or dispense with them (*Bridgend Gas Co. v. Dunraven (Earl)*, 1885, 31 Ch. D. 219).

In making agreements, all equitable as well as legal interests known to the promoters must be dealt with (*Martin v. L. C. & D. Rwy. Co.*, 1866, L. R. 1 Ch. 501).

The promoters who enter on lands without agreement or compliance with the Act are trespassers (*G. W. Rwy. Co. v. Swindon, etc., Rwy. Co.*, 1884, 9 App. Cas. 787), and if they fail to pay the agreed price, the owners can either enforce their rights as unpaid vendors or proceed for rescission of the agreement and recovery of the lands (*Munns v. Isle of Wight Rwy. Co.*, 1870, L. R. 5 Ch. 414; *Wing v. Tottenham, etc., Rwy. Co.*, 1868, L. R. 3 Ch. 740).

The consideration for the agreement in the case of persons under disability may be a rent-charge recoverable by action or distress, but not by the remedies of an unpaid vendor (1845, ss. 10, 11; 1860, ss. 1, 2; *Jersey (Earl) v. Briton Ferry Rwy. Co.*, 1869, L. R. 7 Eq. 409; *Forster v. Manchester and Milford Rwy. Co.*, 1880, 14 Ch. D. 645).

In the event of a scheme of arrangement being sanctioned under the Railway Companies Act, 1867, the unpaid vendors' rights, if not provided for by the scheme, will be protected by the Courts (*In re Somerset and Dorset Rwy. Co.*, 1870, 18 W. R. 332; *In re Cambrian Rwy. Co.*, 1868, L. R. 3 Ch. 278).

If the undertaking is abandoned, the unpaid vendor, under the Parliamentary Deposits Act, 1892 (55 & 56 Vict. c. 27), can resort to the parliamentary deposit. This right only arises where the land has been compulsorily taken, or has been injuriously affected by the commencement, construction, or abandonment of the work; but when it exists, appears to give such creditors priority over other creditors, meritorious or non-meritorious; but a notice to treat not acted on gives a *pari passu* claim only (*In re Uxbridge, etc., Rwy. Co.* 1890, 43 Ch. D. 536; *Ex parte Bradford District Tramways Co.*, [1893] 3 Ch. 463).

**COMPULSORY ACQUISITION.**—The compulsory powers cannot as a rule be exercised until the capital of the undertaking is fully subscribed, and the fact certified by two justices, whose certificate, if not fraudulently obtained, is conclusive (1845, ss. 16, 17; *Ystalyfera Iron Co. v. Neath and Brecon Rwy. Co.*, 1874, L. R. 17 Eq. 142). This provision is intended to protect land-owners by ensuring a fund out of which to pay them, and can be waived by them (*Guest v. Poole and Bournemouth Rwy. Co.*, 1870, L. R. 5 C. P. 553). It does not apply to an authorised branch of an existing line (*Weld v. L. & S.-W. Rwy. Co.*, 1864, 33 L. J. Ch. 142), nor to cases where purchase of an easement is authorised (*G. W. Rwy. Co. v. Swindon, etc., Rwy. Co.*, 1883, 9 App. Cas. 787).

These powers must be exercised within the time limited by the special



Act, or if there is no special limit, within three years of the passing of the special Act (1845, s. 123), or the time limited by any extending Act (*Bentley v. Rotherham L. B.*, 1877, 4 Ch. D. 588). If a notice to treat is given within the time but not proceeded on, the landowner can compel the promoters to proceed (*Richmond v. North London Rwy. Co.*, 1868, L. R. 3 Ch. 680); and if the notice is followed up by entry within the prescribed time it may be enforced by the promoters afterwards (*Tiverton Rwy. Co. v. Loosemore*, 1884, 9 App. Cas. 480).

*Notice to Treat.*—Whether lands are in the end taken by agreement or compulsorily, the usual, and, in the case of compulsory taking, the necessary, preliminary is the service of a “notice to treat.” It should accurately indicate the position and area of the lands required, and be addressed to and served on all the persons interested in the lands required, or the persons enabled by the Act to sell and convey such lands, or on such of them as shall after diligent inquiry be known to the promoters. It must also state the willingness of the promoters to treat for the purchase of the lands, and as to compensation for damage caused by execution of the works, and must demand particulars of the estate and interest of each party in the lands, and should specify whether it is sought to take the minerals; though a second notice to treat may be subsequently given as to minerals (*Errington v. Met. Dist. Rwy. Co.*, 1881, 19 Ch. D. 559). It is authenticated by the seal of the company or by signature in accordance with sec. 139 of the Companies Clauses Act, 1845, but does not require a stamp (*Rawlings v. Met. Rwy. Co.*, 1868, 37 L. J. Ch. 824).

Mistakes on the plans are fatal unless corrected (1845, c. 20, s. 7). Persons interested include not merely the legal or beneficial owners or persons having absolute powers of sale, but also mortgagees, rent-chargers, or other persons who have a security over the land, as distinct from the goodwill, etc., of a business carried on there (*Martin v. L. C. & D. Rwy. Co.*, 1866, L. R. 1 Ch. 501; *Cooper v. M. B. W.*, 1883, 25 Ch. D. 472). Each lessee must have a separate notice to treat (*Abrahams v. London (Mayor, etc.)*, 1868, L. R. 6 Eq. 625). Where trustees have an absolute power of sale the beneficiaries need not be served, but it is sufficient to serve a tenant for life (1845, s. 7).

The notice to treat to be valid must be served in such way as to bind both parties (*Shepherd v. Norwich (Mayor, etc.)*, 1885, 30 Ch. D. 553). When this has been done it puts the landowner and promoters into a position analogous to that of vendor and purchaser, under an inchoate contract of sale, where the price remains to be fixed, but the machinery for fixing it is settled. But no action will lie to enforce the contract till the price is fixed. If the company will not proceed the remedy is by writ or action of mandamus. In the case of Crown Commissioners a notice to treat is not treated as a binding contract (*R. v. Woods and Forests*, 1850, 15 Q. B. 761); but municipal corporations are in the same position as commercial promoters (*Steele v. Liverpool (Mayor)*, 1866, 14 W. R. 311).

In only one case can the promoters withdraw, viz. where the notice to treat relates to part only of a “house, building, or manufactory,” if the owner is willing and able to sell the whole (1845, s. 92). Where the owner is so willing he gives the promoters a verbal or written counter-notice stating such willingness. The words in question have been very liberally construed in favour of landowners. “House” is read as including curtilage, garden, and all that is necessary to its enjoyment (*Barnes v. Southsea Rwy. Co.*, 27 Ch. D. 536). It is immaterial in such a case that different parts

of the tenement are enjoyed under separate titles (*Siegenberg v. Met. Dist. Rwy. Co.*, 1884, 49 L. T. 554). "Manufactory" is read as including the whole of any building part of which is used as a factory (*Brook v. M. S. & L. Rwy. Co.*, [1895] 2 Ch. 571). For these purposes the condition of the property at the date of the notice to treat determines the rights of the parties (*Ex parte Edwards*, 1871, L. R. 12 Eq. 389). The promoters on receipt of the counter-notice, unless they have power by the special Act to acquire an easement only or part only, must on receipt of the counter-notice either take the whole or abandon their notice to treat, provided that they have not actually entered (*Grierson v. Cheshire Lines Committee*, 1875, L. R. 19 Eq. 83). They cannot go over the land on arches or tunnel under it (*Sparrow v. Oxford, etc., Rwy. Co.*, 1852, 21 L. J. Ch. 731, and see *Caledonian Rwy. Co. v. Turcan*, 1898, W. N. 18). Assent to the counter-notice creates an inchoate contract of purchase. After receipt of the notice to treat the person served is given twenty-one days to send in particulars of his claim, stating—

- (1) His interest in the lands and its value;
- (2) Any outstanding mortgages or charges;
- (3) The amount of damage which he may sustain by the execution of the works;
- (4) The mode in which he wishes the claim assessed.

It is the established practice, except when excluded by statute, to add to the price 10 per cent. for compulsion to sell in the case of house property, and an even larger percentage in the case of agricultural land.

The claims are usually framed in great detail by expert surveyors (*Lloyd*, 6th ed., 70; *Cripps*, 3rd ed., 111).

If the limit of twenty-one days is exceeded, this in no way bars the claim, which may be made at any time (see *Delany v. M. B. W.*, 1867, L. R. 2 C. P. 532; 3 C. P. 111); but at the expiration of the twenty-days if the claim is not delivered, or the parties have not come to terms, the promoters can proceed to obtain assessment of the compensation by justices, arbitration, or jury, according to the amount involved or their own choice.

*Entry on Lands.*—Secs. 84–90 of the Act of 1845 regulate the powers of the promoters to enter on lands to be acquired. They cannot lawfully do so except—

(1) On obtaining the consent of the owners and occupiers (*Birmingham, etc., Land Co. v. L. N.-W. Rwy. Co.*, 1888, 40 Ch. D. 268).

(2) On paying or depositing the purchase-money or compensation agreed or awarded.

(3) In case of entry for survey only, and to set out the works (s. 84).

(4) In case of lands required for permanent uses where there is urgent and immediate need for entry, and the promoters have executed a statutory bond and deposited in the Bank of England the amount claimed by the owners as price and damage, or an amount assessed by a surveyor in respect of all lands comprised in the notice to treat, or a counter-notice if any (1845, ss. 85–88; *Hill v. Midland Rwy. Co.*, 1883, 21 Ch. D. 143; *Giles v. L. C. & D. Rwy. Co.*, 1861, 30 L. J. Ch. 603).

The deposit is made at the Law Courts Branch of the Bank of England, and is subject to the Supreme Court Fund Rules, 1894, and is cash under the control of the Court. It is paid in as security for performance of the conditions of the statutory bond to pay or deposit as soon as ascertained the purchase-money or compensation (s. 85).

Once these sections have been complied with, the owners cannot eject

the promoters, but must proceed to get the price and damages assessed, under secs. 22, 68, or 121, according to the case. If entry is wilfully made without complying with the statute, the promoters incur liability to an action for trespass, and also to pay a penalty and damages, recoverable summarily, or, in the event of persistence after conviction, to penalties recoverable by action (1845, ss. 89, 90).

**TRIBUNALS FOR ASSESSING PRICE AND COMPENSATION.**—Where the purchase-money or compensation is not agreed, the Acts provide four modes for its ascertainment—

1. By surveyors.
2. By justices.
3. By arbitration.
4. By the under-sheriff and a jury.

1. *Surveyors.*—(a) Where a person interested in lands taken or injuriously affected is under disability or incapacity, or has not power to sell or convey except under the Clauses Acts or the special Act, the compensation payable must not be less than the amount fixed by two able practical surveyors, one selected by each party, or if they cannot agree, by a third surveyor selected by two justices on the application of either party. If the promoters neglect to appoint their surveyor, mandamus lies to compel them (*Fotherby v. Met. Rwy. Co.*, 1867, L. R. 2 C. P. 188). The surveyors must meet and consult before deciding (*Wycombe Rwy. Co. v. Donnington Hospital*, 1866, L. R. 1 Ch. 274), and a declaration in writing annexed to the valuation verifying its correctness must be made by the surveyors, or if they differ, by the justices' surveyor (*Bridgend Gas Co. v. Dunraven (Earl)*, 1886, 31 Ch. D. 219). The promoters must deposit the amount of the valuation in the Bank of England (*Stone v. Yeovil (Mayor)*, 1876, 1 C. P. D. 691).

(b) In cases where there is no doubt as to the title to the lands, but the owner is absent from England or cannot be found, or does not appear at the time appointed for assessment by a jury, the purchase-money, etc., is assessed at the expense of the promoters by a surveyor nominated in writing by two justices, who subscribes a declaration of impartiality. The nomination and declaration are annexed to the valuation and preserved by the promoters (1845, ss. 58–62). On the deposit of the amount of the valuation in the Bank of England and execution of a deed poll (1845, ss. 76, 77) by the promoters, the lands vest in them. But the owner can challenge the valuation and submit it to arbitration (1845, ss. 64–67). Where ownership is doubtful, the assessment is by a jury and not by the surveyor (*Ex parte L. & S.-W. Rwy. Co.*, 1869, 38 L. J. Ch. 527).

(c) Similar procedure is adopted with respect to commonable rights where the parties entitled have been duly summoned and do not appear (1845, ss. 102, 106).

(d) Where promoters desire to enter on and use lands before the compensation is agreed on or assessed, they must either deposit in the Bank of England the sum claimed or have a valuation made by a surveyor appointed by two justices, or in the case of railways by the Board of Trade (1845, s. 85; 30 & 31 Vict. c. 127, s. 36).

The surveyors appointed or nominated should be impartial and not connected by interest or employment with either promoters or owners (*Langham v. G. N. Rwy. Co.*, 1857, 16 L. J. Ch. 437; *Peters v. Lewes, etc., Rwy. Co.* 1881, 18 Ch. D. 429).

The costs of getting out the money deposited in the bank fall as a general rule on the promoters (see *Ex parte Flower*, 1876, L. R. 1 Ch. 599; and Costs, below, p. 285).

2. *Justices*.—The amount of purchase-money or compensation may be settled by two justices in the following cases:—

(a) Where the compensation claimed by the owner of lands as their value or for injury done to them does not exceed £50 (1845, s. 22; *Barker v. Nottingham and Grantham Rwy. Co.*, 1864, 33 L. J. C. P. 193).

(b) Where a person who has no greater interest than as tenant for a year or from year to year is required to give up possession before the expiration of his tenancy (1845, ss. 121, 122).

This section applies where less than a year is unexpired of a term under a lease (*R. v. G. N. Rwy. Co.*, 1876, 2 Q. B. D. 151).

The time from which computation is to be made is the date when notice of intention to take the lands is given, whether by notice to treat or taking possession (*Tyson v. London (Mayor)*, 1871, L. R. 7 C. P. 18; *R. v. G. N. Rwy. Co.*, *supra*).

In the Metropolitan Police District a police magistrate has the power of two justices (*R. v. Kennedy*, [1893] 1 Q. B. 533).

Justices acting for the assessment of compensation or appointment of surveyors under the Lands Clauses Acts appear not to be a Court of summary jurisdiction, and the procedure and limitation of time for applications is certainly not subject to these Acts; and the function of the justices is merely to assess the compensation (*R. v. Edwards*, 1884, 13 Q. B. D. 586), which when assessed is recoverable by action and not by distress or summary process under the justice's order.

Justices have no jurisdiction to assess compensation for injuriously affecting lands in which the claimant has a greater interest than as a yearly tenant, nor if such claim is made can they proceed under sec. 121, as to other parts of the claim which would fall within that section (*Bexley Heath Rwy. Co. v. North*, [1894] 2 Q. B. 579).

3. *Arbitration*.—The compensation payable under the Acts may be settled by arbitration in the following five cases:—

(a) Where it is intended to purchase or take lands and the compensation offered or claimed exceeds £50, and the interest to be acquired is not a yearly tenancy, and the claimant so desires and gives notice specifying the nature of his interest before a warrant for a jury is issued (1845, s. 23).

(b) Where lands have been taken for, or injuriously affected by, the execution of the works (1845, s. 68).

(c) Where the undertakers and the claimants agree to a reference of claims, which would otherwise be settled by justices.

(d) Where the owner desires a review of a surveyor's valuation (1845, ss. 64–67).

(e) Where the promoters and a person entitled to pre-emption of superfluous lands cannot agree as to the price (1845, s. 130).

The mode of appointing arbitrators and the procedure on the arbitration is governed partly by the Lands Clauses Acts, or other incorporated Acts; and partly by the Arbitration Act, 1889 (52 & 53 Vict. c. 49). The parties may agree to appoint a single arbitrator, or failing this may each choose their own. In such a case the two arbitrators before acting appoint an umpire (1845, s. 25). If the arbitrators or one of them dies or becomes unable to act, another may be appointed. If an umpire dies or becomes incapable, the arbitrators may appoint another, and if they fail to do so another may be appointed by two justices, or in the case of a railway company, the Board of Trade (1845, ss. 27, 28; 1883, c. 15, s. 1). If one arbitrator refuses to act, or one party neglects to appoint a new arbitrator where his has died or become unable to act, the other can act alone (1845, ss. 26, 30). Where an

arbitrator or umpire dies before award, and the parties by agreement go on before a sole arbitrator, it is treated as a continuation of the statutory arbitration (*R. v. Manley Smith*, 1894, 63 L. J. Q. B. 171).

Where the arbitrators do not make their award within twenty-one days of the date on which the last appointment was made, or within any extended period not exceeding three months afforded by them, the umpire must act alone and make an award within three months of his appointment (s. 31) (*R. v. Manley Smith*, 1894, 67 L. J. Q. B. 171). Where the award is not made within the prescribed time or the reference fairly for other reasons, resort must be had to a jury.

The arbitrators and umpire must make a declaration to act faithfully and honestly, and if corrupt are guilty of misdemeanour (1845, s. 33), and can be prohibited from proceeding (*Malmesbury Rwy. Co. v. Budd*, 1876, 2 Ch. D. 113). Accidental omission to make the declaration may be waived (*Palmer v. Metropolitan Rwy. Co.*, 1862, 31 L. J. Q. B. 259).

Subject to the specific provisions of the L. C. Acts and the special Act, the arbitration is one by consent within the Arbitration Act, 1889, and the parties may consent to include in it matters outside the statute (*Collen v. South Staffordshire Rwy. Co.*, 1852, 7 Ex. Rep. 5).

The arbitrators, if experts, need not hear evidence on matters of value (*Bottomley v. Ambler*, 1878, 38 L. T. 545), but must give both sides full opportunity of calling evidence. If questions of law arise on the arbitration, the tribunal must, if required, state them by special case for the opinion of the High Court; or may draw the award in the form of a special case, which can be considered by the High Court; and on appeal by the C. A. (*In re Gonty and M. S. & L. Rwy. Co.*, [1896] 2 Q. B. 439) attempts to exceed jurisdiction may be stopped by an order to revoke the submission (*E. & W. India Docks Co. v. Kirk*, 1887, 12 App. Cas. 738).

The award when made is enforced by action: for specific performance where land is taken or required; and by action for the assessed amount of injury consequent on the construction of the works (*Harding v. M. B. W.*, 1873, 7 Ch. App. 154; *In re Newbold and Metropolitan Rwy. Co.*, 1863, 14 C. B. N. S. 405). The promoters can be compelled by mandamus to take up the award (1845, s. 35; *R. v. L. N.-W. Rwy. Co.*, [1894] 1 Q. B. 512). It is a good answer to such a proceeding to prove that the lands have not been injuriously affected (*R. v. Cambrian Rwy. Co.*, 1869, L. R. 4 Q. B. 320). They must retain the original and supply the landowner with a copy at their own expense if he requires it. If the landowner does so himself, he could not prior to 1895, but can now recover the cost of taking it up (*Shrewsbury (Earl) v. Wirrall Railways Committee*, [1895] 2 Ch. 812; 58 & 59 Vict. c. 11).

Under the Arbitration Act, 1889, it can also be enforced by leave of the Court in the same way as a judgment or order; but as it only settles the amount of compensation and not the title to receive it, this course is rarely if ever adopted (see *Brierley Hill L. B. v. Pearsall*, 1883, 9 App. Cas. 595; *Walker v. Beckenham L. B.*, 1884, 50 L. T. 207; *Oliver and Scott's arbitration*, 1890, 43 Ch. D. 310), and is appropriate only when the right to compensation and the title of the claimant are both clear.

4. *Jury*.—The compensation may be settled by a jury where the claim is over £50—(a) as to lands taken where the landowner does not claim arbitration, or the arbitrators or umpire fail to make an award within the prescribed time or date; (b) as to lands entered upon or injuriously affected, if the claimant desires claim a jury and the promoters do not agree to pay him the amount claimed (1845, s. 68). In the case of entry on lands, a yearly

tenant must resort to justices whatever the amount of his claim. See p. 277, above.

The promoters have to give a ten days' notice of intention to summon a jury, and to specify therein how much they are willing to pay, and also not less than ten days' notice of the time and place of inquiry (1845, ss. 38, 46). The jury, which may be common or special, is summoned by the sheriff, except in cases of lands in Westminster, where the high bailiff acts (1845, c. 18, ss. 41, 54; 1869, c. 18, s. 3).

5. *Other Special Tribunals.*—In the case of railway undertakings, besides the tribunals created by the Lands Clauses Acts, the promoters, in the case of a compulsory taking or of injurious affecting, may, under sec. 41 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), apply for trial of the question in the High Court by a judge and jury or a judge alone to a master in chambers, and on appeal to a judge in chambers (*Oliver's claim*, 1890, 24 Q. B. D. 507; *In re Donisthorpe and M. S. & L. Rwy. Co.*, [1897] 1 Q. B. 671).

A similar power is given under sec. 26 of the Housing of the Working Classes Act, 1890; but the order or refusal of the judge at chambers is not appealable (*Ex parte Stevenson*, [1892] 1 Q. B. 394, 609).

*Jurisdiction.*—The jurisdiction of all these assessing tribunals, unless extended or restricted by the special Act, does not empower them to inquire into the title or interest of the claimant, which it must assume to be correctly stated, nor to determine his right to compensation (*Brierley Hill L. B. v. Pearsall*, 1883, 9 App. Cas. 595). They can only determine the amount of purchase-money or compensation payable on the assumption that the claimants are entitled (*R. v. Edwards*, 1884, 13 Q. B. D. 586; *R. v. Metropolitan Rwy. Co.*, 1863, 32 L. J. Q. B. 367).

A submission to arbitration or a warrant to the sheriff or an application to justices should state accurately the title or interest to be the basis of assessment (1845, ss. 23, 24, 68); and the tribunal must not go into collateral matters (*In re Dare Valley Rwy. Co.*, 1868, L. R. 6 Eq. 429).

Where a tribunal is improperly constituted or assumes a jurisdiction it does not possess or exceeds its jurisdiction, it can be corrected by prohibition or *certiorari* (*Cowper Essex v. Acton L. B.*, 1889, 14 App. Cas. 153, 160; *R. v. Rand*, 1866, L. R. 1 Q. B. 230). Except in such cases or refusal to admit proper evidence, or the adoption of a wrong principle of assessment, the proceedings of the tribunal are not open to review (*Stebbing v. M. B. W.*, 1870, L. R. 6 Q. B. 37). In the case of arbitration the procedure for review is by motion to revoke the submission, or by requiring the arbitrator to state a special case on the points of law involved (*In re Harper and G. E. Rwy. Co.*, 1875, L. R. 20 Eq. 39; *Rhodes v. Airedale Drainage Commissioners*, 1876, 1 C. P. D. 402; 1845, s. 57; 1889, c. 49, ss. 7, 19).

*Enforcement.*—1. When the value of lands has been properly assessed under the statute, either party can sue for specific performance of the complete contract thereby constituted (*Regent's Canal Co. v. Ware*, 1857, 26 L. J. Ch. 566; *R. v. Edwards*, 1884, 13 Q. B. D. 586; *In re Piggott and G. W. Rwy. Co.*, 1881, 18 Ch. D. 146; *Bridgend Gas Co. v. Dunraven (Earl)*, 1886, 31 Ch. D. 219). The promoters, if the owner will not convey, can pay the price into Court and take possession of the lands (1845, ss. 76, 77). Where they have paid, they are entitled to have the deposit paid out to them (*Ex parte Midland Rwy. Co.*, 1894, W. N. 38).

2. If the promoters have entered into possession and have not paid, the owners have all the remedies of unpaid vendors against the promoters and the lands (*Munns v. Isle of Wight Rwy. Co.*, 1870, L. R. 5 Ch. App. 414); or

can obtain the sum deposited in Court as a condition precedent to entry (1845, ss. 85-87; *In re Mutlow's Estate*, 1879, 10 Ch. D. 130).

3. When the price is fixed, the owner, after tendering a conveyance, can bring an action for the amount assessed for price or compensation; to which the promoters can raise any available defence which does not traverse the amount payable (*Ferrar v. London Commissioners of Sewers*, 1869, L. R. 4 Ex. 227).

The same procedure may be adopted for recovering compensation for injurious affecting, except as to tender of conveyance.

Where the promoters have entered before the assessment of compensation, they can be forced to take the necessary steps for assessment by proceedings under secs. 68, 121 of the Act; and if they do not, are liable to pay a price put on the lands by the owner, if he has properly stated his interest (*Mortimer v. South Wales Rwy. Co.*, 1859, 28 L. J. Q. B. 129).

THE MEASURE OF COMPENSATION.—1. Where land is required under a notice to treat, or is entered on and taken, the compensation payable is the commercial value to the owner at the date of the notice to treat or entry (*Stebbing v. M. B. W.*, 1870, L. R. 6 Q. B. 37; *In re Morgan and L. N.-W. Rwy. Co.*, [1896] 2 Q. B. 469). This rule excludes—(a) consideration of what the promoters will gain by getting the land, or of any appreciation or depreciation of the lands by the taking; (b) consideration, by way of set-off, of any enhancement by the works of adjoining land of the same owner (*Eagle v. Charing Cross Rwy. Co.*, 1867, L. R. 2 C. P. 638). Under the name "betterment" an allowance of such set-off has been much advocated. In Acts regulating commissions of sewers, and in cases of special improvement areas, the principle of contribution by reference to benefit has to some extent been recognised. In the case of the Tower Bridge Approaches Act (58 & 59 Vict. c. cxxx.) some concession was made to the advocates of betterment charges. The present condition of opinion and legislation in England is fully stated in Browne and Allan on *Compensation*, pp. 683-699 (*Knight v. Langport Drainage Board*, 1898, 14 T. L. R. 253; and *In re London County Council and City of London Brewery Co.*, [1898] 1 Q. B. 387).

In certain colonies the set-off for benefit is allowed (*Harding v. Board of Land and Works*, 1886, 11 App. Cas. 208; *Raleigh Corporation v. Williams*, [1893] App. Cas. 540).

2. Where land is not taken, but only injuriously affected by the execution of the authorised works, compensation is payable in the following events:—

(1) Where the loss or damage flows from an act legalised by the statutory powers of the promoters, which would have been actionable but for these powers (*Harrison v. Southwark Water Works*, [1891] 2 Ch. 409; *Elmsley v. N.-E. Rwy. Co.*, [1896] 1 Ch. 432).

(2) Where the loss is occasioned by the construction, and not by the user, of the works, and is an injury to lands, and not a personal injury or an injury to trade or goodwill (*A.-G. v. Metropolitan Rwy. Co.*, [1894] 1 Q. B. 384; *Hammersmith Rwy. Co. v. Brand*, 1869, L. R. 4 H. L. 171).

This excludes negligent exercise of statutory powers, which is actionable (*L. B. & S. C. Rwy. Co. v. Truman*, 1885, 11 App. Cas. 45; Beven on *Negligence*, 2nd ed., 340).

The injury must be sustained in respect of the ownership of some legal right or interest in lands, including easements (*M. B. W. v. McCarthy*, 1874, L. R. 7 H. L. 243; *In re Gower's Walk Schools*, 1889, 24 Q. B. D. 326; *Caledonian Rwy. Co. v. Walker's Trustees*, 1882, 7 App. Cas. 260). Whether the damage is permanent or temporary does not affect the right to recover,

but only the amount recoverable (*M. B. W. v. McCarthy*, *supra*). The assessment of this class of damage, past or future, is usually deferred till the works are complete (*R. v. Poulter*, 1888, 20 Q. B. D. 132).

3. Where lands not taken, but injuriously affected, are held by the same owner as lands taken for the same common object, even if not under the same title, nor physically contiguous to those taken, the owner is entitled to compensation for severance or other injurious affecting if the taking depreciates his land. The right to proceed under the Act for compensation exists only where the proceedings causing the injury are within the statutory authority; but the assessment of damage appears not to be limited, as in cases where no land is taken (*Cowper Essex v. Acton L. B.*, 1889, 14 App. Cas. 153; *In re Gower's Walk Schools*, 1889, 24 Q. B. D. 326), and may extend even to depreciation caused by the use as well as the construction of the undertaking (*Buccleuch (Duke) v. M. B. W.*, 1872, L. R. 5 H. L. 418).

The damages in these cases are usually assessed with the price of the lands taken, but in separate sums if either party so requires; and not only all past damage, but all future damage which can be foreseen, must be dealt with (*Caledonian Rwy. Co. v. Lockhart*, 1860, 3 Macq. (H. L. Sc.) 808), except in the case of mines and minerals, which are specially dealt with (see below).

The value is ascertained in one of two ways—(1) by assessing the value of the land to the owner, and adding compensation for damage directly consequent on the taking; or (2) on the reinstatement principle, by fixing such a price as will enable him to purchase lands and premises of equal value to him (*London S. B. v. S.-E. Rwy. Co.*, 1887, 3 T. L. R. 710).

In the damage consequent on taking are included damages directly, and not remotely, incurred by an occupier by necessity of removal (*Bigg v. London (Mayor)*, 1873, L. R. 15 Eq. 376), such as the value of fixtures attached to the freehold, the costs of removal of furniture and goods, and loss on forced sale (*Ex parte Bergin*, 1884, 13 L. R. Ir. 245), and diminution in the value of goodwill in consequence of the expropriation (*Dublin (Mayor) v. Dowling*, 1880, 6 L. R. Ir. 502; see *Cooper v. M. B. W.*, 1883, 25 Ch. D. 472; *R. v. Scard*, 1894, 10 T. L. R. 545). It is usual to add 10 per cent. to the valuation for compulsory purchase, except where it is excluded by statute (see 53 & 54 Vict. c. 70, s. 21).

Great controversies have from time to time arisen as to the inclusion or exclusion of trade interests, especially in public-houses, which cannot be regarded as satisfactorily settled (see *In re London C. C. and City of London Brewery Co.*, [1898] 1 Q. B. 387).

The interest is valued as at the date of service of notice to treat, where no other date is indicated by the special Act (*Wilkins v. Birmingham (Mayor)*, 1883, 25 Ch. D. 78; *Bexley Heath Rwy. v. North*, [1894] 2 Q. B. 579). The valuation may properly include the potential value of the lands, or their suitability for the particular purpose for which they are taken (*Riply v. G. N. Rwy. Co.*, 1875, L. R. 10 Ch. App. 435; *Manchester (Mayor) v. Ossalinski*, 1883; Cripps on *Compensation*, 3rd ed., 127).

The interest of a tenant or lessee is usually computed on so many years' purchase of the difference between the rent reserved and the improved annual rental, and that of a reversioner by calculating the present value of his reversionary interest. Copyhold lands are valued as other lands, less the cost of enfranchisement.

There has been some difference of judicial opinion as to whether a second assessment can be made of damages which could not have been



foreseen when the first assessment took place, which cannot be said to have been authoritatively settled (see *Lawrence v. G. N. Rwy. Co.*, 1851, 16 Q. B. 343; *Croft v. L. N.-W. Rwy. Co.*, 1863, 32 L. J. Q. B. 133). On general principles of law the right would appear to exist (*Darley Main Co. v. Mitchell*, 1886, 11 App. Cas. 127), unless it can be said to be cut down by the terms of the special and incorporated Acts.

It is to be noted that the right to compensation for injurious affecting under sec. 68 exists whether lands or easements have been acquired compulsorily or by agreement (*Kirby v. Harrogate School Board*, [1896] 1 Ch. 437, at 449).

*Mines.*—The Water Works Clauses Act, 1847, and the Railways Clauses Consolidation Act, 1845, contain provisions, often incorporated in special Acts, with reference to the taking of mines and minerals.

The effect of these sections is that the railway acquires only the surface, without any statutory right to support from the minerals (*G. W. Rwy. Co. v. Bennett*, 1867, L. R. 2 H. L. 27), and that the time for acquiring and paying for the support of the line by adjacent or subjacent minerals does not arrive until the owner works them. It is immaterial whether the working is by mining or by open cast, provided it is the mode usual in the district (*Midland Rwy. Co. v. Robinson*, 1889, 15 App. Cas. 19).

The owner can, on giving notice of intention to work, enter on the land acquired by the railway and dig up the line (*Ruabon Brick and Terra-Cotta Co. v. G. W. Rwy. Co.*, [1893] 1 Ch. 427; but till the time for working any stratum not sold arrives no compensation is payable (*In re Lord Gerard and L. N.-W. Rwy. Co.*, [1895] 1 Q. B. 459; *Holliday v. Wakefield Corporation*, [1891] App. Cas. 81).

The rules apply equally where the promoters or the owners assign or let their property (*Pountney v. Clayton*, 1883, 11 Q. B. D. 820). These provisions differ considerably from those acquired under local Acts prior to 1845, under which, without buying minerals, the promoters acquired a right to support, without compensation, e.g. in the case of canals (*Knowles v. L. & Y. Rwy. Co.*, 1889, 14 App. Cas. 248; *Chamber Colliery Co. v. Rochdale Canal Co.*, [1895] App. Cas. 564; *L. N.-W. Rwy. Co. v. Evans*, [1893] 1 Ch. 16; *New Moss Colliery Co. v. M. S. & L. Rwy. Co.*, [1897] 1 Ch. 725), and of railways (*G. W. Rwy. Co. v. Cefn Cribbur Brick Co.*, [1894] 2 Ch. 157). The questions arising under Inclosure Acts are somewhat different (*Bell v. Dudley (Earl)*, [1895] 1 Ch. 182).

The compensation for unworked minerals under the Railway Clauses Act is ascertained under the Lands Clauses Acts (*R. v. L. N.-W. Rwy. Co.*, [1894] 2 Q. B. 512), unless the special Act creates another tribunal (*Hanley and Buxnall Coal Co. v. North Staffordshire Nail Co.*, 1891, 64 L. T. 656).

**LANDS SUBJECT TO PARTICULAR INCIDENTS OR CHARGES.**—*Copyholds.*—Where copyholds are acquired the conveyance is entered on the Court rolls of the manor, and the enrolment has the same effect as if the lands were of freehold tenure (1845, s. 95). Within three months after enrolment or one month after entry on the lands, the promoters must apply for enfranchisement (*Lowther v. Caledonian Rwy.*, [1892] 1 Ch. 73). The measure of compensation to the lord is the amount of loss (assessed on the improved value of the lands) in respect of fines, heriots, and other services and matters consequent on the enfranchisement, other than the fine due on alienation to the promoters (1845, ss. 96, 97) (*Ecclesiastical Commissioners v. L. & S.-W. Rwy. Co.*, 1854, 14 C. B. 743; *Lowther v. Caledonian Rwy. Co.*, [1892] 1 Ch. 73). The promoters are entitled to an acknowledgment from the lord of their right to production of his title-deeds and an undertaking for safe

custody (*In re Agg-Gardner*, 1884, 25 Ch. D. 600). The amount assessed is paid to the lord, or if he be a tenant for life is paid into Court, and invested for the benefit of the estate (*In re Wilson*, 1863, 32 L. J. Ch. 191). On payment or tender or deposit in the Bank of England the lord, whether under disability or not, can and must enfranchise, or if he does not or fails to deduce a satisfactory title, the promoters may effect the same end, by executing a deed poll (1845, ss. 69, 73, 97). Where part only of lands subject to a customary rent are taken, the rent is apportioned (1845, s. 98). The steward can only make the promoters pay fees as for surrender (*Cooper v. Norfolk Rwy. Co.*, 1849, 3 Ex. Rep. 546).

*Common and Waste Lands.*—Where lands of this kind are taken, both the lord and the commoners are entitled to compensation according to their interests. The lord, on payment or tender of the agreed or assessed compensation, conveys to the promoters his interest in the soil (1845, ss. 99, 100). He is not deprived of this interest by being trustee for the commoners as well as lord (*A.-G. v. Meyrick*, [1893] App. Cas. 1), and the compensation for the interest of the commoners may be treated for by a committee of commoners, or if none is appointed, by a surveyor appointed by two justices (1845, ss. 102–106).

The mode of assessment is by agreement, or failing agreement by arbitration or jury (*Bee v. Stafford & Uttoxeter Rwy. Co.*, 1875, 23 W. R. 868). The interests of the commoners vest in the promoters on payment or deposit of the compensation and execution of a deed poll by the latter (1845, s. 107). The compensation is paid over to the committee or into the Bank of England, and apportioned among those commoners who can prove a legal title to share (*Austen v. Amherst*, 1878, 7 Ch. D. 689); and they are entitled to costs as against the promoters (*Waterlow v. Burt*, 1870, 39 L. J. Ch. 425). In case of controversy they may invoke the aid of the Board of Agriculture, which has succeeded the Inclosure Commissioners. Commoners can prevent the promoters from proceeding till the compensation has been properly ascertained (*Stoncham v. L. B. & S. C. Rwy. Co.*, 1871, L. R. 7 Q. B. 1).

*Mortgaged Lands.*—Where lands to be acquired are under mortgage, the promoters may acquire the interest of the mortgagee, and if the lands are an insufficient security for the mortgage the value of the lands must be agreed as between mortgagee and the person entitled to the equity of redemption or failing such agreement assessed as in other cases; and when this is done the amount is paid over to the mortgagee, and his interest in the land ceases, but not his remedies against the mortgagor. The mortgagee conveys or releases his interest to the promoters, and if he fails to do so the promoters can vest the land in themselves by deed poll (1845, ss. 108, 109, 111, 113). Provision is made for taking part of lands in mortgage and for paying the costs of reinvestment if paid off before the time limited for redemption (1845, s. 114). Unless the mortgagee's interest is acquired the promoters cannot legally enter (*Ranken v. E. & W. India Docks Co.*, 1850, 19 L. J. Ch. 153; *Martin v. L. C. & D. Rwy. Co.*, 1866, L. R. 1 Ch. App. 501).

These sections do not apply to mortgages of chattels or goodwill; but where a mortgage includes goodwill, the mortgagee may be entitled to any compensation for loss of profits in the business carried on on the premises taken (*Ex parte Lambton*, 1876, 3 Ch. D. 36; *Cooper v. M. B. W.*, 1883, 25 Ch. D. 472).

*Rent-Charges, etc.*—Provision is made for extinction of rent-charges, rents service, and chief rents, by paying the agreed or assessed compensation and stating a release of the charge, or in default of its owner by deed poll

executed by the promoters. The release operates only to release so much of the charged lands as are not actually taken (1845, ss. 115–118).

*Lands under Lease.*—Where part of lands under lease is taken the rent is apportioned (1845, s. 119) by agreement between lessor and lessee, or in default by two justices. If the lessor will not agree the compulsory powers must be exercised (*Slipper v. Tottenham, etc., Rwy. Co.*, 1867, L. R. 4 Eq. 112). The costs of apportionment do not fall on the promoters unless a deposit has been made under sec. 80 of the Act of 1845 (*Ex parte Flower*, 1866, L. R. 1 Ch. 599).

*Omitted Interests.*—Where by *bond fide* mistake or inadvertence the promoters fail or omit to buy or compensate for an interest in lands on which they have entered in whatever manner, they are entitled to remain in possession of such lands provided that within six months of the establishment of the rights of the entitled owner, they obtain agreement or assessment as to the value of the omitted interest, less improvements if any are created by the promoters (1845, ss. 124–126; *Hyde v. Manchester (Mayor)*, 1852, 5 De. G. & Sm. 249; *Salisbury (Marquis of) v. G. N. Rwy. Co.*, 1858, 5 C. B. N. S. 174).

*COMPENSATION FOR RATES AND TAXES.*—When lands have been acquired for the purposes of an undertaking the promoters (until the works are completed, and such part of them as becomes assessable is assessed) are liable to make good any deficiency in land tax and poor rate, consequent on the taking of the land (1845, s. 133). Poor rate includes borough rate and county rate (see *Farmer v. L. N.-W. Rwy. Co.*, 1888, 20 Q. B. D. 788), but not the metropolitan general purposes rate, unless it is named in the special Act (*Burrup v. L. & S.-W. Rwy. Co.*, 1891, 64 L. T. 112).

The liability is computed on the rental, whether the lands taken were or were not occupied when taken, and whether the taking was legal or not (*Putney Overseers v. L. & S.-W. Rwy. Co.*, [1891] 1 Q. B. 440). Public bodies which take land are just as liable as commercial promoters (*Bristol (Governor of Poor) v. Bristol (Mayor)*, 1887, 18 Q. B. D. 549; *Shoreditch Vestry v. London C. C.*, [1895] 2 Q. B. 104). The deficiency is calculated with regard to the rateable or taxable value at the time when the special Act was passed; and where the lands were exempt nothing is payable (*Stratton v. M. B. W.*, 1875, L. R. 10 C. P. 76). In the case of improvement schemes by public authorities the liability goes on till the improvement is structurally completed and the land to be sold under the scheme is all disposed of (s. c.). See LAND TAX.

*CONVEYANCE.*—Where the owner of lands is absolutely entitled and able and willing to make a good title and to accept the purchase-money when tendered, the lands are conveyed at the cost of the promoters by deed in ordinary form or the forms scheduled to the Act of 1845 (A. B.) (1845, ss. 81, 82). Their liability to costs includes everything concerned with the conveyance, but nothing concerned with the ascertainment of price (*In re Hampstead Junction Rwy. Co.*, 1863, 33 L. T. Ch. 79; *Ex parte Christ's Hospital*, 1864, 12 W. R. 669). It extends to costs of taking out representation to perfect a title (*In re Lloyd and L. N.-W. Rwy. Co.*, [1896] 2 Ch. 397).

The costs, if not agreed nor paid, may be taxed in the Chancery Division on an order of the Court at the expense of the promoters, unless over one-sixth is taxed off (1845, ss. 52, 83; *Ex parte Somerville*, 1883, 23 Ch. D. 167). The costs, when taxed, are enforceable under the order, or by distress under the Lands Clauses Act (ss. 53, 138).

*PAYMENT INTO COURT.*—Where the owner of lands has only a limited interest, and is only entitled to sell or convey under the Lands Clauses

Act, the purchase-money—(1) if under £20, can be paid to the persons entitled to the rents and profits of the lands (1845, c. 18, s. 72); (2) if over £20 and under £200, is either paid into the Bank of England or to trustees nominated by the parties entitled to receive (1845, c. 18, s. 71); and (3) if £200 or over, is paid into Court in the Chancery Division (1845, c. 18, s. 69) in the manner prescribed by the Supreme Court Funds Rules, 1894 (*Ann. Pr.* 1898).

The same procedure is adopted where the owners are prevented from treating or cannot make a good title or refuse to convey (1845, ss. 76, 79).

Where this course is adopted the promoters can, by executing a deed poll, vest in themselves the lands to be taken (1845, ss. 76, 77); and the owners or claimants must apply to the Court for the deposited price or compensation. The application is by petition or summons, according as the cost is over or under £1000 (1845, ss. 70, 78; R. S. C. 1883, Order 55). There is a vast mass of decisions on these applications which turn mainly on questions of real property law, or costs.

The making of the deposit is obligatory on the promoters (*Stone v. Yeovil (Mayor, etc.)*, 1877, 2 C. P. D. 99), but may be dispensed with (*In re Milnes*, 1875, 1 Ch. D. 28). If it raises questions of construction of a will or otherwise complicated (*In re Hicks*, 1894, 63 L. J. Ch. 568), or is for variation of an order made on petition (*In re Sanders*, 1894, 70 L. T. 755), the Court has a discretion to permit proceedings by petition in lieu of summons (*In re Bethlehem and Bridewell Hospitals*, 1885, 30 Ch. D. 541). The persons entitled to apply for payment or transfer are the persons entitled to the rents and profits of the land which the sum in Court represents (1845, c. 18, s. 70), and the applicant must verify his title (Order, 52, r. 18).

The deposit is treated as realty but may be invested, and (the income is treated as personalty) until it is applied as provided by the Act (1845, ss. 69, 70; *Kelland v. Fulford*, 1877, 6 Ch. D. 491).

The funds in Court may be applied—

(1) In purchasing or redeeming land tax or encumbrances on the lands taken or affected or other lands settled or standing limited to the same uses, including purchase of the surrender of a beneficial lease (*Ex parte Sheffield (Mayor)*, 1856, 25 L. J. Ch. 587; *In re Derby Municipal Estates*, 1876, 3 Ch. D. 289; *Kelland v. Fulford*, 1877, 6 Ch. D. 491).

(2) In the purchase of other lands to be settled to the like uses, or the erection of new buildings, or additions or improvements to existing buildings, or removing or replacing buildings interfered with by the proximity of the works.

(3) As capital moneys under the Settled Land Acts, as amended by the Housing of the Working Classes Act, 1890, c. 70, s. 74. See Cripps on *Compensation*, 3rd ed., 260–264.

(4) In interim investments in any security authorised for funds in Court (1845, c. 18, s. 70; R. S. C. 1883, Order 22, rr. 17, 17 a; *Ann. Pr.* 1898, p. 523).

**COSTS.**—The Acts contain a general (s. 80) and several special provisions as to costs:—

1. The promoters have to bear the expense of valuing the interest of an owner who cannot be found or is absent from the realm (1845, s. 62).

2. The costs of any arbitration as to disputed compensation under the Acts, but not (as to superfluous lands) including the fees of the arbitrators, fall on the promoters, unless the award is for the same or a less amount than the promoters' final offer, in which event each party pays his own costs (1845, ss. 32, 51; 1895, c. 11, s. 1; *Miles v. G. W. Rwy.*

*Co.*, [1896] 2 Q. B. 432; *Shrewsbury (Earl) v. Wirrall Railways Committee*, [1895] 2 Ch. 812). The costs must not be included in the award, but if not agreed, may be taxed by a Master of the Supreme Court, who, in case of doubt, will not tax except in obedience to a mandamus (*Church v. London School Board*, 1891, 40 W. R. 333; *R. v. Manley Smith*). Under Michaelangelo Taylor's Act (57 Geo. III. c. xxix.) the owner gets no costs in any event, and if less is awarded than was offered is liable to pay the costs of the local authority.

3. The provisions as to costs of assessment by a jury are substantially the same as on arbitration (1845, ss. 38, 51, 52; *R. v. Manley Smith*, 1883, 12 Q. B. D. 481; *R. v. L. N.-W. Rwy. Co.*, 1882, 51 L. J. Q. B. 241). They are taxed by a master in the Queen's Bench Division.

4. The costs of arbitration as to superfluous land are in the discretion of the arbitrator.

5. The costs of conveyance fall on the promoters.

6. Where money is deposited in Court under the Lands Clauses Act or the special Act or any other incorporated Act, the jurisdiction of the Court to enforce liability for costs rests on sec. 80 of the Act of 1845, subject to the wide discretion as to costs given by the Judicature Acts (see *In re Fisher*, [1894] 1 Ch. 450). This enactment imposes on the promoters liability for all reasonable charges, but not to costs incurred by unnecessary and vexatious proceedings, under the following heads:—

(1) Purchase and taking and their consequences, *e.g.* apportioning rents and taking out representation to complete title (*Ex parte Flower*, 1866, L. R. 1 Ch. App. 599; *In re Lloyd and North London Rwy. Co.*, [1896] 2 Ch. 397).

(2) Investment in Government or real securities or as capital money under the Settled Land Acts, including all incidental expenses (*In re Hanbury's Trusts*, 1883, 52 L. J. Ch. 687).

(3) Reinvestment in lands, or investment redeeming land tax (1845, c. 18, s. 1).

(4) Payment out of Court (*In re Bethlehem Hospital*, 1875, L. R. 19 Eq. 457).

There is no liability where the deposit in Court was due to wilful refusal to receive it or wilful neglect to make a good title, nor for costs of litigation between adverse claimants (1845, c. 18, s. 80). See Cripps, 3rd ed., 286–288.

*Superfluous Lands.*—Where lands are acquired under the Lands Clauses Acts, they vest in the promoters, subject to the terms of their special Act, and, generally speaking, may be dealt with by them in the same way as by any other landowner, subject to this that they must be used for the purposes of the special Act, and in such a way as not to incapacitate the promoters from carrying out the special Act (*Swindon W. W. v. Wilts and Berks Canal*, 1875, L. R. 7 H. L. 697; *Bayley v. G. W. Rwy. Co.*, 1884, 26 Ch. D. 434; *Foster v. L. C. & D. Rwy. Co.*, [1895] 1 Q. B. 711; *A.-G. v. Uddington Urban District Council*, [1898] 1 Ch. 66; *Macfie v. Callander and Oban Rwy. Co.*, 1898, W. N. 20 (7)). This prevents them from alienating such land unless it was acquired for extraordinary purposes (1845, s. 13; *Bayley v. G. W. Rwy. Co.*, *supra*) or has become superfluous (1845, s. 127).

Lands acquired for extraordinary purposes are never to be treated as "superfluous lands" (*City of Glasgow Union Rwy. Co. v. Caledonian Rwy. Co.*, 1871, L. R. 2 H. L. Sc. 660). That expression does not include even lands occupied for an abandoned scheme (*Smith v. Smith*, 1868, L. R. 3 Ex. 282), and is restricted to lands which, whether acquired compulsorily or by

negotiation, turn out not to be "required" or "necessary" at the end of ten years or the prescribed period. Where the surface is required and mines also are taken, the latter appear not to be superfluous (*Hooper v. Bourne*, 1880, 5 App. Cas. 1); nor conversely is land over a tunnel or under arches (*In re Metropolitan District Rwy. Co. and Cosh*, 1880, 13 Ch. D. 607; *Foster v. L. C. & D. Rwy. Co.*, [1895] 1 Q. B. 711).

Whether lands have or have not become superfluous is in each case a question of fact, subject to any question of estoppel. Where the undertakers have by their acts, *e.g.* recitals, or a conveyance, or statements in an offer for sale, treated them as superfluous (*L. & S.-W. Rwy. Co. v. Blackmore*, 1870, L. R. 4 H. L. 610; *Dunhill v. N.-E. Rwy. Co.*, [1896] 1 Ch. 121), and in each case the requirements of the undertaking and the user of the lands before or after the end of the prescribed period have to be considered (*Hooper v. Bourne*, 1880, 5 App. Cas. 1, 16; *Foster v. L. C. & D. Rwy. Co.*, [1895] 1 Q. B. 711).

They may become superfluous in four ways (*May v. G. W. Rwy. Co.*, 1875, L. R. 7 H. L. 283):—

(a) If taken compulsorily upon a wrong and excessive estimate of the area required;

(b) If taken on compulsion by the owner when only part was required and demanded under the original notice to treat;

(c) If taken and required for permanent works, but occupied by works subsequently abandoned;

(d) If taken for temporary purposes which have come to an end.

They do not become superfluous by being compulsorily acquired by other promoters under another special Act (*Dunhill v. N.-E. Rwy. Co.*, [1896] 1 Ch. 121). If they become superfluous within the prescribed period the promoters can sell (1845, s. 127) the absolute freehold interest only, subject to restrictive conditions for their own protection, provided that they do not reserve any interest in the land (*L. & S.-W. Rwy. Co. v. Gomm*, 1882, 20 Ch. D. 562; *In re Higgins and Hitchman's Contract*, 1882, 21 Ch. D. 95; *Ray v. Walker*, [1892] 1 Q. B. 88); and the lands on sale appear to revert to their original condition prior to the passing of the special Act (*Bird v. Eggleton*, 1885, 29 Ch. D. 1012).

Where superfluous lands are not in a town and not built upon (*i.e.* covered with continuous buildings), nor actually used for building purposes, the promoters must first offer them to the owner for the time being of the lands from which they were originally severed; or if he will not purchase or cannot be found, then to the owners for the time being of the lands immediately adjoining. They cannot give a valid title to an outside buyer until an offer has been made to the persons successively entitled to pre-emption (*Carington v. Wycombe Rwy. Co.*, 1868, L. R. 3 Ch. 377; *L. & S.-W. Rwy. Co. v. Blackmore*, 1870, L. R. 4 H. L. 610).

The right to pre-emption arises as soon as the promoters have done anything which clearly shows the lands to be superfluous (*Beauchamp v. G. W. Rwy. Co.*, 1868, L. R. 3 Ch. 745; *Dunhill v. N.-E. Rwy. Co.*, [1896] 1 Ch. 121), and is enforceable by action. Where the lands are offered to persons entitled to pre-emption, the right is lost if refused or not accepted within six weeks of receipt (1845, s. 129). The price, if not agreed, is fixed by arbitration, but the procedure therein is not regulated by secs. 24–44 of the Act of 1845. Where a right of pre-emption is not claimed, the promoters may sell and convey all the rights in the superfluous lands to anyone willing to purchase, for an absolute estate in fee-simple (1845, ss. 131, 132; *Pountney v. Clayton*, 1883, 11 Q. B. D. 820). If the power

of sale is not exercised within the prescribed period, superfluous lands vest in the adjoining owners, including lessees or owners of limited interests in proportion to the extent of their adjoining lands (1845, s. 127), without the need of any consent or acceptance by them (*G. W. Rwy. Co. v. May*, 1875, L. R. 7 H. L. 283; *Blackmore v. L. & S.-W. Rwy. Co.*, 1870, L. R. 4 H. L. 610; *Hooper v. Bourne*, 1880, 5 App. Cas. 1). The division is usually, but not invariably, made according to the length of the frontage of each (*Moody v. Corbet*, 1866, L. R. 1 Q. B. 510; *Smith v. Smith*, 1868, L. R. 3 Ex. 282).

[*Authorities.*—Cripps on *Compensation*, 3rd ed., 1892; Lloyd on *Compensation*, 6th ed., by Brooks, 1895; Balfour Browne and Allan on *Compensation*, 1896.]

**Land Societies.**—The object of a land society (often called a freehold land society) is to enable persons of small means to become owners of plots of land at wholesale prices. Subscriptions are received from the members and applied to the purchase of an estate, which is laid out in lots of a convenient size, with all necessary roads, sewers, and improvements. The lots are then distributed among the members, by ballot or otherwise, at a fixed price, which is made to include the initial price of the land, *plus* the expense of all improvements and the costs of conveyance. If a member is in a position to pay for his lot at once, he may do so, and obtain his conveyance forthwith; otherwise he pays for his lot by instalments, commonly called subscriptions, and which include interest, and the society gives him a conveyance on his payments being completed; or he obtains a conveyance in the first instance, and mortgages the property to the society as security for the due payment of his instalments. A land society is thus essentially different from a building society.

“A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst them; but a building society advances to its borrowing members money derived from the subscriptions, and which the borrowing members themselves lay out in the purchase of lands or buildings, and then mortgage them to the society” (*Grimes v. Harrison*, 1859, 26 Beav. 435, per Romilly, M. R.). It not unfrequently happens, however, that a land society and a building society exist side by side and work together under practically the same management.

A land society may be established by deed of settlement; or it may take the form of a joint-stock company under the Companies Acts; or it may be registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), and it is believed that a large and increasing number of societies are now formed in this way. The rights and liabilities of the members will, of course, vary according to the mode in which the society is constituted. An ordinary land society established by deed is not an association having for its object the acquisition of gain, and is therefore not illegal under sec. 4 of the Companies Act, 1862, although consisting of more than twenty members (*In re Siddall*, 1885, 29 Ch. D. 1; *Crowther v. Thorley*, 1884, 32 W. R. 330; *Wigfield v. Potter*, 1883, 45 L. T. 612).

In ascertaining whether the owner of a lot, who has mortgaged it to the society to secure the payment of his subscriptions, is entitled to a vote for the county as a forty shilling freeholder, it would seem that the sums payable in respect of interest are alone to be deducted, and not the payments made in reduction of the principal mortgage debt (see *Rollleston v. Cope*,

1871, L. R. 6 C. P. 292—decided in the case of an advanced member of a building society).

[*Authorities.*—Davis on *Building and Land Societies*, 4th ed.; Wurtzburg on *Building Societies*, 3rd ed.]

**Land Steward**—A person who has the care of a landed estate. He sees that the covenants in the leases are duly fulfilled, sees to repairs, and generally supervises the estate on behalf of the landlord.

## Land Tax.

### TABLE OF CONTENTS.

NATURE . . . . .	289	ASSESSMENT, COLLECTION, AND	
INCIDENCE . . . . .	290	MANAGEMENT . . . . .	292
		REDEMPTION . . . . .	296

### NATURE.

The land tax was first imposed in 1689 (1 Will. & Mary, c. 3). It was developed from the fixed assessments imposed by the Commonwealth on the abolition of the subsidies and fifteenths which had been substituted for the feudal scutage. It was intended to be a tax on personal property, salaries, and land; and in 1692 (4 Will. & Mary, c. 1) it was assessed at 4s. in the £ on all real estate assessed on the *bond fide* rack-rent, and on offices (except naval and military offices), and at 24s. per £100 on personal estate. It was originally, but inappropriately, described as an aid by a land tax, when it was more correctly a national assessment. In 1698 (9 & 10 Will. III. c. 10) there was substituted a grant of a fixed sum, called an aid by a land tax; and the quotas to be collected from the different districts were specified. From 1698 till 1797 the tax was voted annually, and the maximum pound rate to be levied was fixed. The tax has never been levied in Ireland, but was extended to Scotland at the Union, and the quota for Scotland was fixed in 1706 by the Act and Treaty of Union (6 Anne, c. 11, art. ix.) at £48,000, when £1,997,763 was the English portion, and more or less in proportion as the English quota rose or fell. By the annual Act of 1797 (1797, c. 5, ss. 2, 128) the English quota was fixed at £1,989,673, 7s. 10½d., and the Scotch quota at £47,954, 1s. 2d.; and the amount to be collected from specified local areas in each kingdom was also fixed. These provisions were stereotyped and made perpetual in 1798 (c. 60, s. 1), and have not since been altered (see 52 & 53 Vict. c. 50, s. 102). The Act of 1802 (42 Geo. III. c. 116, s. 3), while repealing the rest of the 1798 Act, kept secs. 1 and 2 alive. They are subject to provisions as to redemption and purchase, now superseded by subsequent legislation; but the perpetual provisions did not apply to taxation imposed by the Act of 1797 on personal estate, offices, or pensions, which continued to depend on annual Acts until abolished in 1833 (3 & 4 Will. IV. c. 12). See INCOME TAX.

The effect of thus stereotyping the tax has been to keep its amount unrevised and unaltered (except by redemption), and to keep the local and national quotas fixed, regardless of the enormous relative changes in the value of taxable subjects in the different areas of taxation. A controversy at one time existed, in which it was contended that the Land Tax Commissioners had power to equalise the quotas; but this contention was held to be unfounded (*R. v. Tower Division Land Tax Commissioners*, 1863, 22 L. J. Q. B. 389).



The tax never was a charge on the land, in the strict sense of that term, but was merely a tax upon owners, calculated by reference to their personalty, the offices they held, or the land they occupied (*Astle v. Grant*, 1781, 2 Doug. 722).

The maximum pound rate to be levied was 4s. in the £ from 1797 till 1896, when it was lowered to 1s. (59 & 60 Vict. c. 28, s. 31). The minimum rate leviable on a rich area is now 1d. in the £. It had been as low as 1-17th of 1d. on rich areas.

*Deficiency.*—Where the maximum rate does not produce the quota, the deficiency is remitted.

*Surplus.*—Where the minimum rate produces more than the quota, the surplus is applied—(a) in making allowances to assessors; (b) in redeeming tax to the extent of 1-30th of the surplus (1880, c. 19, s. 114; 1896, c. 28, s. 32 (3)). The commissioners must before 24th December in each year certify to the Inland Revenue the amount of any surplus exceeding £5 (1880, c. 19, s. 114).

#### INCIDENCE.

The tax falls on the following subjects:—On manors, messuages, land and tenements, quarries, mines of coal, tin, and lead, copper, mundick, iron, and other mines; iron mills, furnaces, and other ironworks; alum mines and works, parks, chases, warrens, woods, underwoods, copses, fishings, tithes, tolls, annuities, and *all other yearly profits* and all hereditaments, of what nature and kind soever they be, lying and being, happening or arising, within the areas in respect whereof the quotas are fixed, and on the persons or corporations having or holding any of the taxable subjects in respect thereof (38 Geo. III. c. 5, s. 4; *Royal Exchange Assurance v. Vaughan*, 1757, 1 Burr. 155).

Until 1833 (3 & 4 Will. IV. c. 12) the tax fell on personalty as well as realty. But that portion of the tax was not rendered perpetual by 38 Geo. III. c. 60 (see s. 2), and after 25th March 1799 depended on future Acts; but in practice it escaped taxation. See INCOME TAX.

There has been a good deal of litigation as to the meaning and scope of the words defining incidence, which may be thus summarised:

"Tolls" did not include tolls on turnpike roads (38 Geo. III. c. 5, s. 122). Taxable tolls are taxed as tenements distinct from the site of the bridge or lands in respect of passage over which they are chargeable, and are taxable even if the tax on the site of the bridge or lands has been redeemed (*Vauxhall Bridge Co. v. Sawyer*, 1851, 6 Ex. Rep. 504; *Mitchell v. Charing Cross Bridge Co.*, 1855, 25 L. J. Q. B. 131; *Waterloo Bridge Co. v. Cull*, 1858, 28 L. J. Q. B. 70).

Annuities or other yearly payments secured on land are taxable, and the appropriate part of the tax on the land in security is deducted on payment of the charge, unless its terms or the agreement of the parties otherwise provides (*Attwood v. Lamprey*, 1719, 3 P. Wms. 127 n; *Robinson v. Stephens*, 1709, 2 Salk. 616; *Nichols v. Leeson*, 1747, 3 Atk. 573).

All persons who have shares or interest in the New River Co. (or the Thames, Marylebone, or Hampstead Waterworks), or in insurance offices, or in the King's Printing House, and companies of merchants, trade guilds, and the Bank of England, are taxable (1797, c. 5, s. 57. See *New River Co. v. Hertford Land Tax Commissioners*, 1856, 26 L. J. Ex. 281). This rule applies now only where the shares are treated as realty.

The tax also falls on fairs, and is payable by tenants of booths, subje

to deduction from their rents (1797, c. 5, ss. 125, 126), and a special mode of recovery (s. 42).

A railway tunnel, constructed under a special Act authorising the appropriation and use of subsoil without acquiring the surface, has been held to be a hereditament subject to land tax, as being more than a mere easement (*Metropolitan Rwy. Co. v. Fowler*, [1893] App. Cas. 416; and cp. *Holywell Union (Assessment Committee) v. Halkyn District Mines Drainage Co.*, [1895] App. Cas. 117). But in the case of a mere right to lay pipes through or under land, which is only an easement, the owners of the pipes do not own lands or hereditaments within the Act (*Chelsea Waterworks v. Bowley*, 1851, 17 Q. B. 358).

Annual tithe rent-charge, payable in lieu of the extraordinary tithe levied on hop grounds, orchards, fruit plantations, and market gardens, has been held to be exempt from land tax, which, however, is deducted by the person liable to pay the rent-charge on computing its capital value (*Carr v. Fowle*, [1893] 1 Q. B. 251). The decision rests on the construction of the word "assessment" in 49 & 50 Vict. c. 54, which is treated as excepting the rent-charge from liability under the word "tithes" in the Act of 1797.

Fee-farm rents, rents service, or other rents, payments, sums of money, and annuities issuing out of, or payable for, any lands, or reserved or charged thereupon, are taxable (38 Geo. III. c. 5, ss. 5, 24).

The amount leviable as the quota cannot be diminished by any acts of the taxpayer, but liability to pay land tax may be legally shifted by the owner of the taxable subject on to his tenant or occupier, if apt words are employed in the contract of tenancy or occupation (1797, c. 5, ss. 34, 35).

Land tax has been held to be within covenants imposing on a tenant liability for "taxes" (*Amfield v. White*, 1825, Ry. & M. 246), or "parliamentary taxes" (*Manning v. Lunn*, 1845, 2 Car. & Kir. 13; and see Bourdin, 4th ed., pp. 25, 26).

Where a contract of tenancy is silent, the tenant pays the tax, and deducts it from his rent, subject to reference to the Land Tax Commissioners in case of dispute as to the amount which is to be deducted. A deduction must be made on the current rent, and if not then made, cannot be recovered later (*Spragg v. Hammond*, 1820, 4 Moo. C. P. 431).

A tenant who, by paying a premium, sits at less than a rack-rent, is liable for the proportion of land tax appropriate to his beneficial interest in the demised premises (*Ward v. Const*, 1830, 10 Barn. & Cress. 634).

*Exemption.*—Crown property, if in the occupation of the Crown, is exempt from the tax on general principles (*A.-G. v. Hill*, 1836, 2 Mee. & W. 160; *Colchester (Lord) v. Kewney*, 1867, L. R. 2 Ex. 252, 258), but Crown property in private occupation is not exempt (42 Geo. III. c. 116, s. 141).

Houses, etc., occupied by persons entitled to diplomatic immunity are not exempt, but the diplomatist is exempt, and the owner of the house is liable (38 Geo. III. c. 5, s. 46).

Poor persons are not chargeable with land tax in England, Wales, or Berwick upon lands, tenements, and hereditaments not of the full yearly value of 20s. on the whole (38 Geo. III. c. 5, s. 80).

The following buildings are exempt:—Colleges and halls in the Universities of Oxford and Cambridge; the colleges of Windsor, Eton, Winchester, and Westminster, and Bromley; and corporation of the governors of the charity for the relief of poor widows and children of clergymen; and hospitals in England, Wales, and Berwick-on-Tweed.

The exemption extends to the sites of the colleges, etc., and buildings within their walls and limits, and houses or lands which belonged

on or before 25th March 1693 to the sites of any college or hall, and to houses or lands which then belonged to Christ's, St. Thomas', St. Bartholomew's, Bethlehem, or Bridewell Hospitals, and to revenues or rents payable before that date to any of those hospitals for disbursement or the immediate relief of the poor of the hospitals.

Lands, revenues, or rents belonging to a hospital or almshouse or settled to pious uses which were assessed under the Act of 1692 (4 Will. & Mary, c. 1) are not exempt from the tax. And in the case of hospitals or almshouses not exempted by name the Land Tax Commissioners have to decide how far they are exempt or chargeable (38 Geo. III. c. 5, ss. 28, 29).

The exemptions arose originally under annual Acts, but were made perpetual by 38 Geo. III. c. 60; and the two Acts have been read as conferring exemption only as to hospitals existing in 1797 (*Colchester (Lord) v. Kewney*, 1867, L. R. 2 Ex. 253), by making the land then chargeable perpetually subject to the tax.

In fact the scheme of the two Acts is to continue the charge existing in 1797 on the lands then liable, and to leave exempt those then exempt, regardless of any change in the user of the exempted lands since that date (*Cox v. Rabbits*, 1878, 3 App. Cas. 473).

Allotments under Inclosure Acts are exempt, if made in respect of lands or common rights belonging to hospitals (*Boehm v. Wood*, 1823, 1 Turn. & R. 332).

Certain particular exemptions of land from taxes by statutes prior to 1798 have been held to continue as to the land tax under the Act of 1797 (*Williams v. Pritchard*, 1790, 4 T. R. 2; 2 R. R. 310; *Pritchard v. Heywood*, 1800, 8 T. R. 468).

The exemption of college buildings applies to buildings taken into and made part of the college between 1693 and 1797, but not if a special Act authorising the taking in the liability of the land to all taxes is preserved (*All Souls' College v. Costar*, 1804, 3 Bos. & Pul. 635).

The exemption of hospitals extends to buildings within their limits (*Harrison v. Bulcock*, 1788, 1 Black. H. 68).

At one time Roman Catholics who would not take the oaths of allegiance and supremacy were doubly assessed. Full powers for relief were given in 1831 (1 & 2 Will. IV. c. 21).

#### ASSESSMENT, COLLECTION, AND MANAGEMENT.

"The provisions for assessing, collecting, and redeeming land tax are contained in numerous Acts which are mainly repealed or obsolete, thus rendering any investigation of the existing law a work of trouble and uncertainty, even to members of the legal profession" (Bourdin, 4th ed., p. v.). This difficulty has to some extent been lessened by the wholesale repeals effected by the Act of 1896 (Finance Act, 1896, c. 28, s. 40), but is by no means wholly removed; and in order to ascertain the present mode of assessment, etc., it is necessary to compare and reconcile the numerous Land Tax Acts with the Taxes Management Act, 1880, c. 19, and the land tax provisions of the Finance Act, 1896, c. 28. The tax is an assessed tax, and its collection and management is under the supervision of the Commissioners of Inland Revenue, subject to the authority, direction, and control of the Treasury (53 & 54 Vict. c. 21, ss. 1, 39). See INLAND REVENUE.

*Land Commissioners.*—Land Tax Commissioners have been from time to time appointed under Land Tax Commissioners Names Acts. That now in force is that of 1893 (56 & 57 Vict. c. 27). It provides that the person named in a schedule signed by and deposited with the clerk of the House

of Commons shall be as fully qualified as if they had been actually named in 7 & 8 Geo. iv. c. 75, in which and in subsequent Acts until 1869 (32 & 33 Vict. c. 64) it was usual to specify the commissioners. The schedule was printed in the *London Gazette* of 4th August 1893, pp. 4444-4463, and corrected in the *London Gazette*, 15th August 1893, p. 4646.

To be entitled to act, a commissioner must not only be on the schedule, but must also possess certain property qualifications, which are—

(1) To entitle him to act for a county or riding, possession of a freehold, leasehold, or copyhold estate of the clear yearly value of £100, or be heir-apparent to such estate of the clear yearly value of £300. One-half of the qualifying estate must be in the county for which the commissioner acts (38 Geo. III. c. 48, s. 3). This qualification is not required in Cardigan, Carmarthen, Glamorgan, Merioneth, Monmouth, Montgomery, Pembroke, or Radnor; and in Anglesey and Carnarvon an estate of £60 per annum qualifies (38 Geo. III. c. 5, s. 91).

(2) To entitle him to act for a city, borough, cinque port, or town corporate, possession of a freehold, copyhold, or leasehold estate of the clear yearly value of £40 or personalty worth £1000, and inhabitancy of the place (1798, c. 48, s. 2).

In the city of London and liberty of St. Martin's-le-Grand, the qualifying estate must be worth £20 a year; and in the city and liberty of Westminster, £50 a year (38 Geo. III. c. 5, ss. 93, 94).

A person qualified by personal estate may act for the place in which he was assessed for income tax (1828, c. 38, s. 3).

Commissioners for a county at large can act for a city or borough for which there are not enough qualified commissioners (1797, c. 5, s. 86).

Besides the scheduled commissioners, all justices of the peace for a county, etc., who have the above qualifications may act as commissioners (7 & 8 Geo. iv. c. 75, s. 1), and mayors of cities and boroughs can also act for their city or borough (38 Geo. III. c. 5, s. 87).

No person who is or has been inspector or surveyor of assessed taxes or collector of any aid granted to the Crown can act as commissioner (38 Geo. III. c. 5, s. 92; 7 & 8 Geo. iv. c. 75, s. 6). A commissioner may not act as to lands in which he is interested (1797, c. 5, s. 23).

Before acting, commissioners for cities and boroughs must take and subscribe the declaration of qualification (1798, c. 48, s. 1); and every commissioner must, if required, make and subscribe a declaration specifying his property qualification, except where he has done so under a previous Names Act, under penalty of forfeiting £200 to the Crown (1797, c. 5, ss. 49, 50). A person who acts without being qualified is liable to a penalty of £50 (1797, c. 5, s. 96; 1798, c. 48, s. 1), recoverable by action or information by a common informer.

The commissioners for each district (county or borough) must meet on or before April 30, and as often besides as necessary. Two are a quorum (1797, c. 5, ss. 7, 8; 1818, c. 38, s. 5; 1880, c. 19, s. 5). At the first meeting they must appoint a clerk (1880, c. 19, s. 41 (6)), and at least two assessors (1797, c. 5, ss. 8, 19, 45, 47). The remuneration of the assessor is now regulated by sec. 114 (10) of the Taxes Management Act, 1880, c. 19.

At the general meeting they ascertain the sum to be charged on each division of their district to make up the quota for the whole district; and they may and do subdivide themselves into bodies of not less than three to act for each division (1797, c. 5, ss. 7, 8).

The commissioners for a division, with the assent of the Board of Inland Revenue, may group parishes for purposes of collection of tax (1880, c. 19,

s. 72); and dissolve the groups if they are found inconvenient. The nomination of collectors is now regulated by secs. 73-79 of the Taxes Management Act, 1880. Under the Act of 1797 (c. 5, s. 14), collectors were paid by a poundage of 3d. in the £ on the amount collected, and the clerks by poundage of 1½d. in the £. But this mode of remuneration has, since April 5, 1891, been superseded by sec. 1 of the Taxes Regulation of Remuneration Act, 1892 (55 & 56 Vict. c. 25).

*Mode of Assessment.*—The taxable subject is to be rated and assessed in the parish in which it lies (38 Geo. III. c. 5, s. 53), except in the case of lands formerly waste or open, or common fields, which have been since enclosures, rated, etc., in a parish other than that in which they lie (1834, c. 60, s. 2; 1880, c. 19, s. 17, Sched. 4), and of lands which from before 1798 have been assessed in another parish. Where lands by long usage have been assessed in a parish in which they do not lie, the commissioners cannot transfer them to their proper parish (*R. v. Morpeth Land Tax Commissioners*, 1877, 36 L. T. 376). Mandamus lies to the commissioners to compel a proper assessment (*A.-G. v. Haytor Land Tax Commissioners*, 1823, 12 Price Ex. 647; but see *R. v. Holborn Land Tax Commissioners*, 1850, 5 Ex. Rep. 248).

Special provision is made as to the place and mode of assessment of certain lands and subjects (1797, c. 5, ss. 37, 57, 70, 71, 77-79, 106, 107, 124; 1878, c. 15, s. 16).

Where land has been assessed in two places, or a dispute arises as to the proper place for assessment, the Queen's Bench Division can give relief or settle the dispute (1838, c. 58, ss. 2-4; see *In re Glatton Land Tax Commissioners*, 1845, 6 Mee. & W. 689).

In the case of parishes detached from the county to which they originally belonged, and transferred to other counties, the amount chargeable at the transfer was certified by the commissioners, who then assessed the commissioners for the county to which the parish is transferred, and they assess, raise, and levy subject to redemption (1842, c. 37, s. 6).

The assessment for land tax is made for the year commencing on March 25, and ending on the next March 24 (1880, c. 19, s. 48 (1)).

Under sec. 180 of the Act of 1802 the assessment was made on the net annual value of the taxable subject, and not on the gross annual value (*R. v. Ivychurch Hundred Land Tax Commissioners*, [1894] Q. B., reported in Bourdin on *Land Tax*, 4th ed., p. 192).

This mode of assessment has been altered by the Finance Act, 1896 (59 & 60 Vict. c. 28, s. 31), under which the amount assessed in a land tax parish on account of the unredeemed quota of land tax charged against the parish must not exceed the amount to be produced by a rate of 1s. in the £ on the annual value of the land, etc., subject to tax or determined by the Land Tax Commissioners on the same basis as if it were determined for the purposes of Sched. A of the Income Tax Act, 1842 (1896, s. 35).

The Inland Revenue authorities read this Act as meaning that the Schedule A assessment is to be applied only where the taxable limit under the schedule is not reached. The instructions given are: "Schedule A income tax annual value" is only required to be taken as the basis of assessment in parishes in which a remission of land tax is authorised and required to be made under the provisions of the Finance Act, 1896, and in parishes where the unredeemed quota is required to be raised by a rate of not less than a 1d. in the £.

The correctness of this interpretation is open to controversy, and has not yet been legally determined. For the purpose of assessment the assessors

and surveyors of taxes may inspect all parish books (1880, c. 19, ss. 39, 61). When the assessors have made the assessment they deliver one copy to the district commissioners and another to the collector (1797, c. 5, s. 8; 1812, c. 116, s. 181). The assessment is open to examination by the inspector or surveyor of taxes (1813, c. 123, s. 17).

Appeals by persons aggrieved lie to the district commissioners, whose decision is final (1797, c. 5, ss. 8, 23), and not subject to appeal by case stated to the High Court, as in the case of house tax or income tax (see 1880, c. 19, s. 59). They can abate or raise the pound rate if it is too high or too low on particular land (1797, c. 5, s. 84; 1802, c. 116, s. 181).

"The fact of no land tax having been assessed on lands for a considerable number of years may reasonably be regarded as presumptive evidence that the property at one time formed part of an estate in respect of which the owner had redeemed the tax or been otherwise exonerated" (Bourdin, 4th ed.).

If the rate assessed does not produce the quota of unredeemed tax, the commissioners reassess to make good the deficiency (1797, c. 5, s. 18). Parishes are answerable for default in collecting the quota (1797, c. 5, s. 8; 1880, c. 19, s. 112).

Assessment must be made in every district in which any land is not exonerated from the tax (1802, c. 116, s. 182).

*Collection.*—The land tax payable on an assessment made for a "financial year" is payable on or before January 1 in that year, unless included in an assessment signed and allowed after January 1; in which event it falls due on the day after it is signed and allowed by the Land Tax Commissioners (43 & 44 Vict. c. 19, s. 82). It is demanded by the collectors from the occupiers, who, if it is paid, give, without charge, acquittances in the prescribed form signed by them; and if payment is refused, can distrain by virtue of the authority given to the collectors under the warrants appointing them. The procedure as to distress is now regulated by sec. 86 of the Taxes Management Act, 1880.

The acts of the collector are not rendered illegal because the commissioners, with a view to speedy redemption, have assessed more than enough to raise the quota (*Allen v. Sharp*, 1848, 17 L. J. Ex. 209; *Simpkin v. Robinson*, 1881, 45 L. T. 224).

When land tax is in arrear the goods and chattels of the defaulter cannot be seized or acquired by any person (except at the suit of the landlord for arrears of rent), unless he first pays the collector the arrears of land tax not exceeding one year's arrears (1880, c. 19, s. 88 (1)). Where more than a year's tax is in arrear, and a private person has seized, he can proceed on paying over one year's tax to the collector; but if he refuses, the collector can distrain and sell to realise the whole of the arrears (s. 88 (2)).

Tenants who have paid the tax without a covenant to that effect in the contract of tenancy, deduct it from their rent. In certain cases it can be deducted even when the tax has been redeemed (1797, c. 5, ss. 30, 31; 1802, c. 116, s. 127; *Moody v. Wells* (*Dean*), 1856, 25 L. J. C. P. 273).

*Fines, etc.*—Fines, penalties, and forfeitures under the Land Tax Acts can be recovered only by authority of the Inland Revenue Commissioners, and in the name of an Inland Revenue officer or of the Attorney-General. The proceedings may be taken in the High Court (1890, c. 21, ss. 21, 22; 1880, c. 19, s. 21; and see INLAND REVENUE).

*Accounts.*—The Inland Revenue have to submit to the Auditor-General an account of all their receipts and expenditure as to the assessment and

collection of land tax, and certificates as to sums due under contracts to redeem land tax (42 Geo. III. c. 116, s. 37; 4 & 5 Will. IV. c. 60, s. 5; 53 & 54 Vict. c. 21, s. 13; and see INLAND REVENUE).

#### REDEMPTION.

*Who may redeem.*—The object of making the land tax perpetual in 1798 was to enable the Government, by the facilities offered for its redemption or purchase, to cause the taxpayer to purchase 3 per cent. Government Stock and transfer it to the National Debt Commissioners for the reduction of the National Debt, to be cancelled by them (38 Geo. III. c. 60, preamble). The consideration for such purchase was to be the redemption and extinction of the tax where the purchaser was owner of or interested in the lands, and the acquisition of a rent-charge where the purchaser was a stranger or did not desire the exoneration of the lands. The policy of the Legislature on this subject has changed from time to time. It is summarised below, subject to the remark that contracts for redemption or purchase are still in the main governed by the statutes under which they were authorised, although these Acts have been repealed (see 1802, c. 116, ss. 2, 127), and that this mode of legislation makes it necessary for purposes of conveyancing and succession to resort in the case of land tax to statutes long since repealed (see *Pigott v. Pigott*, 1867, L. R. 4 Eq. 549; Bourdin, 4th ed., 68).

Under the Act of 1798 the option of redemption was given preferentially to persons in possession for an estate of inheritance, and after them to persons entitled in remainder, reversion, or expectancy. The redemptioner could either redeem the tax *simpliciter*, with the effect of merging it in the inheritance and extinguishing it, or could in the contract declare his election not to exonerate the land from the tax, but to be treated as if he were not interested in the land (1802, c. 116, s. 40). A leaseholder who redeemed had, however, a charge for the cost (*Neam v. Moorsom*, 1868, 37 L. J. Ch. 274).

The Act also contemplated purchase of the tax by strangers; but owing to extension of the time for redemption by persons interested, this power was never exercised under the Act of 1798. By the Act of 1802 (s. 1) the provisions as to redemption of the Act of 1798, and its numerous amendments of 1799, 1800, and 1801, were repealed except as to contracts already made; the option of persons interested to be treated as purchasers was taken away; and the time for exercise of preferential rights to redeem was extended until 24th June 1803. When this time had elapsed strangers were allowed to purchase the tax as a fee-farm rent (42 Geo. III. c. 116, s. 154). This power was taken away in 1853 (16 & 17 Vict. c. 117, s. 1), and now only persons interested in the lands can redeem the tax.

*General Provisions.*—The persons who are now entitled to contract for the redemption of land tax charged on any taxable property are, all persons who have an estate or interest in the property, except tenants at a rack-rent and tenants holding under the Crown (42 Geo. III. c. 116, s. 10; 16 & 17 Vict. c. 117, s. 1). This is extended so as to provide for trustees under settlements, guardians of infants, and committees of lunatics or idiots, and also coparceners, tenants in common, or joint-tenants, and corporations and companies, and trustees for charitable or other public purposes (42 Geo. III. c. 116, ss. 9–14), and promoters under special Acts which incorporate the Lands Clauses Consolidation Act, 1845. Such promoters are liable during the construction of their works to pay any deficiency in land tax caused by their taking the land (8 & 9 Vict. c. 18, s. 133).

Where one joint-tenant redeems his share, and partition is subsequently

effected, his share of the joint estate is exonerated (42 Geo. III. c. 116, s. 39).

Where the redemptioner has not the fee-simple (*Ware v. Polhill*, 1805, 11 Ves. 257; *Bulkeley v. Hope*, 1855, 24 L. J. Ch. 356) the taxable property on redemption is exonerated from the tax, but is charged with the price of redemption and with the yearly payment by way of interest of a sum equal to the land tax redeemed. This right was given in 1802 (42 Geo. III. c. 116, s. 123) and continued till 1853 (16 & 17 Vict. c. 117, s. 2), and was again revived in 1856 (19 & 20 Vict. c. 80, s. 3), but has been repealed in 1896 (59 & 60 Vict. c. 28, s. 40); without, however, affecting contracts for redemption previously made, nor the remedies in respect of the charge (42 Geo. III. c. 116, s. 125), a person who has come into possession of the fee-simple can insist on paying out a person who has redeemed by virtue of a limited interest (*Cousens v. Harris*, 1848, 12 Jur. 835).

Such a rent-charge appears to be a "parliamentary tax" (*Christ's Hospital v. Harrild*, 1841, 2 Man. & G. 706).

Successors in title of a person who had exercised an election to be treated as a purchaser, can, by contract with the Commissioners of Inland Revenue, exonerate the lands and cause the tax to merge in the inheritance by complying with the provisions of 42 Geo. III. c. 116, s. 40, as modified by the repeal effected in 1896 (59 & 60 Vict. c. 28, s. 40; see Bourdin, pp. 72, 73).

There are numerous decisions in which the question has arisen whether a limited owner on redemption has intended to merge the redeemed tax in the inheritance. In each case it is a question of intention as evidenced by his acts (*Emley v. Guy*, 1812, 3 Mer. 702; *Trevor v. Trevor*, 1838, 2 Myl. & K. 675; *Blundell v. Stanley*, 1849, 3 De G. & Sm. 433; *Cox v. Coventon*, 1862, 31 Beav. 378).

*Limited Owners.*—Where the redemptioner had only a limited interest, or was a trustee, or a corporation, he was given powers to sell, mortgage, or create rent-charges over other lands to raise the price. The provisions as to settled land are superseded by the Settled Land Acts (see 40 & 41 Vict. c. 18, s. 34), and were repealed in 1896 (59 & 60 Vict. c. 28, s. 40), except as to stamp duty and sale of timber (42 Geo. III. c. 116, ss. 67, 68). Under sec. 33 of the Act of 1896, where land is held for certain public purposes, the corporation or trustees may sell it to obtain redemption money, or use for redemption moneys held for the same purposes.

Sales or mortgages by limited owners in excess of the powers given under prior Acts were confirmed in 1814 (54 Geo. III. c. 173, ss. 12, 13).

When capital moneys are in Court under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18, s. 69), the Partition Act, 1868 (31 & 32 Vict. c. 40, s. 8), or the Settled Land Act, 1877 (40 & 41 Vict. c. 18, s. 34), they may be applied in redemption of land tax or in reimbursing trustees or tenants for life who have redeemed. By leave of the High Court, timber may be cut and the proceeds of sale applied in redemption (1802, s. 67; *Ex parte Northwick (Lord)*, 1834, 1 Y. & C. C. 166 n).

Where lands are settled for the benefit of a parish or place, the land tax may be redeemed out of the local rate, subject to the approval of two justices (1802, s. 46); and trust property, settled to charitable uses for the benefit of a parish or place, may be applied to redemption of land tax, subject to a charge of an annuity representing the amount applied (1802, s. 47). Donations to charitable institutions may be applied in redeeming land tax; and money may be left by will to redeem land tax on lands settled to charitable uses (1802, ss. 48, 50).



*Crown Lands.*—The tax on Crown lands or lands of the Duchies of Lancaster and Cornwall is not redeemable by the tenants, but may be redeemed by the department charged with the administration of the revenues of the lands with certain consents; upon redemption the lands are exonerated from the tax, which is added to the rent reserved on the Crown leases and the subleases (42 Geo. III. c. 116, ss. 131, 138, 139, 141, 143–147, 149; 5 Geo. IV. c. 78, s. 8; 10 Geo. IV. c. 50, ss. 57–59, 108).

Where, however, Crown tenants have under mistake contracted to purchase land tax on Crown lands, provision is made for validating the purchase through the Commissioners of Woods and Forests, and extinguishing the tax (8 & 9 Vict. c. 99, s. 9).

*Ecclesiastical Lands and Persons.*—Provision was made by a series of Acts from 1806 to 1817, which expired in 1822, for gratuitous exoneration and discharge of land tax on lands belonging to livings or other ecclesiastical benefices and charitable institutions, the whole annual income whereof did not exceed £150. A list of the number of livings exonerated is given in Bourdin (4th ed., p. 92). The exoneration extends to allotments made under Inclosure Acts in respect of the exonerated lands. The statutes in question are—1806, c. 133; 1809, c. 67; 1810, c. 58; 1813, c. 123; 1814, c. 173; 1817, c. 100.

The unrepealed portions of the Land Tax Acts contain many provisions as to the redemption of land tax on ecclesiastical benefices. The tax on a benefice may be redeemed—

(1) By the incumbent for the time being, whether the benefice be single or two livings have been consolidated, subject to a provision in case of subsequent disunion (42 Geo. III. c. 116, ss. 10, 74; 53 Geo. III. c. 123, s. 26). Where the incumbent is sequestrated, the sequestrator or patron may redeem (53 Geo. III. c. 123, s. 27).

(2) By the absolute or alternate patrons, including rectors when patrons of perpetual curacies (42 Geo. III. c. 116, ss. 17, 78, 79; 53 Geo. III. c. 123, s. 128), who become entitled to a rent-charge on the benefice equivalent to the tax redeemed, unless on presentation they suspend it (50 Geo. III. c. 58, s. 2).

(3) By trustees of property left by will to buy lands or impropriate tithes for the benefit of poor clergy, subject to any consents required by the will (42 Geo. III. c. 116, ss. 16, 77).

(4) By the Governors of Queen Anne's Bounty, who may apply money in their hands applicable for the augmentation of livings in two ways—

(a) In redeeming land tax by their own contract, or, in cases where the redemption has been contracted for or effected by the incumbent, with their consent;

(b) In buying up rent-charges created by incumbents for the purpose of redemption (42 Geo. III. c. 116, ss. 15, 44).

Where land tax has been redeemed or purchased by any person other than the incumbent for the time being, he may purchase an assignment of the charge, and free the benefice from it (44 Geo. III. c. 77, s. 1).

The price may be raised by sale or mortgage of lands of the benefice, and the price was paid direct to the assignee and the balance into the Bank of England (45 Geo. III. c. 77, s. 1; 53 Geo. III. c. 123, s. 29). Where the assignment is purchased with the money of the incumbent, he can recoup himself by sale or mortgage, and since 1814 the sales or mortgages are not invalidated because an unnecessary amount of land was sold or charged (53 Geo. III. c. 123, ss. 29, 30; 54 Geo. III. c. 173, s. 51). Assignments

thus obtained must be registered within six months of their date (45 Geo. III. c. 77, s. 1; 53 Geo. III. c. 123, s. 30).

Sales of ecclesiastical land under 42 Geo. III. c. 116, s. 80, by ecclesiastical corporations to redeem land tax, must except or reserve minerals, and this statutory fetter is not affected by 57 Geo. III. c. 100, s. 25 (*Whidborne v. Ecclesiastical Commissioners*, 1877, 7 Ch. D. 375), and is not removed by the Finance Act, 1896.

The surplus remaining after redemption of land tax out of the price of lands sold for the purpose (42 Geo. III. c. 116, s. 100) could not be applied except in paying off debts charged on the inheritance or in buying lands to be settled to like uses (*Nether Stowey Vicarage*, 1873, L. R. 17 Eq. 156; but see *City of London Commissioners of Sewers v. St. Botolph Vicarage*, [1894] 3 Ch. 544).

Where the incumbent of a rectory redeems land tax out of his own moneys, his representatives can recover interest at 3 per cent. on the redemption money from the next incumbent (*Kilderbeere v. Ambrose*, 1854, 10 Ex. Rep. 454).

Land tax charged on lands, etc., belonging to an ecclesiastical corporation redeemed by such corporation out of moneys raised under the powers of the Acts was treated as a yearly rent in addition to the yearly rent reserved (42 Geo. III. c. 116, s. 88). This provision was repealed in 1896 (c. 28, s. 40).

Gifts or devises of redeemed or purchased land tax for the augmentation of a benefice are valid and not subject to the Mortmain Acts (42 Geo. III. c. 116, s. 162), and may be accepted as a fee-farm rent for such purposes by Queen Anne's Bounty (s. 161).

Sales by ecclesiastical corporations required from 1799 (39 Geo. III. c. 21) the approval of commissioners, who were appointed by letters patent to regulate, direct, approve, and confirm contracts of sale, enfranchisement, or mortgage, or to grant rent-charges permitted by the statutes for the purpose of redeeming land tax, and made by corporations, or companies, or trustees for charitable or other public purposes, or in the case of lands in which the Crown had an interest (42 Geo. III. c. 116, ss. 72-84; 54 Geo. III. c. 173, ss. 2, 4). These commissioners had power to appoint a secretary and other officers (1802, c. 116, s. 75). Their powers and duties were in 1838 transferred to the Treasury (1838, c. 38, s. 1).

The Treasury were entitled, if not satisfied with statements made in support of the proposed contract, to require further information and its verification by affidavit made before a commissioner of oaths (42 Geo. III. c. 116, s. 74); and the conveyance under the contract was invalid unless signed by two commissioners of the Treasury (s. 76).

Having regard to the changes in the procedure for redemption and the repeals effected by the Finance Act, 1896, the functions of the Treasury would seem, though not formally repealed, to have virtually come to an end.

*Price.*—Until 1896 the redemptioner could redeem either by payment in money or by a transfer of Government Stock. The latter method had been rarely adopted in recent years, being more troublesome and expensive; but it was the only method where the redemption price exceeded £500, and had to be raised by sale or mortgage of settled land or ecclesiastical or trust property. The stock selected was 3 per cent. Consols, and tables for calculating the price were annexed to the Act of 1802 (Schd. L). The amount of stock was increased by 1-11th on the conversion of Consols into Goschens (52 & 53 Vict. c. 42, s. 9). Under the Finance Act, 1896 (c. 28, s. 40), the

power of redemption by transfer of stock is taken away, and the prior enactments giving it are repealed.

The price for redemption by any person entitled to redeem is now thirty years' purchase of the sum assessed on the taxable property by the last assessment made and signed, less any increase due to the new mode of assessment. It may be paid in a single instalment or by such instalments as may be agreed with the Commissioners of Inland Revenue, with interest at 3 per cent. on the unpaid balance, subject to a right at any time to pay the whole of the unpaid balance (1896, c. 28, s. 32). The redemptioner on payment is entitled to a certificate from the Inland Revenue charging the land with the price paid and interest thereon equal to the cost of the land tax redeemed, which has the effect of a mortgage deed, and, if registered under 51 & 52 Vict. c. 51, gives him priority over all other charges and incumbrances (1896, c. 28, s. 33 (a)).

*Procedure for Redemption.*—The general control of the redemption and purchase of land tax was originally committed to commissioners appointed from time to time by royal warrant for each district, and selected from the Land Tax Commissioners (see 42 Geo. III. c. 116, ss. 5–8, 199). In 1813 (53 Geo. III. c. 123, s. 1) they were superseded by the Commissioners of Taxes; and the control is now in their successors, the Commissioners of INLAND REVENUE. This neutralises the provisions as to payment and qualification to sit in Parliament (42 Geo. III. c. 116, ss. 183, 185). A decision was given in *Williams v. Steward*, 1817, 3 Mer. 472, 494, with respect to the Redemption Commissioners, to the effect that the only remedy against them was by *mandamus*; and this would seem to be still the rule (*Ex parte Nathan*, 1884, 12 Q. B. D. 461; *Income Tax Commissioners v. Pemsel*, [1891] App. Cas. 531).

Under their general powers as to notices, forms, and instructions, the Inland Revenue Department prepare and issue instructions as to procedure for redemption and the documents to be used (1802, c. 116, s. 84; 1813, c. 123, s. 9; 1880, c. 19, s. 15; 1896, c. 28, s. 34).

Instructions for redemption under the Act of 1896 have been issued (A. & C. G. Form 327).

The would-be redemptioner must attend personally, or by authorised agent, before the clerk to the Land Tax Commissioners of the district in which the lands lie; and sign a declaration in the appropriate form prescribed by the Inland Revenue, and should produce a plan or full description of the property. The clerk to the commissioners attests the declaration and certifies the amount of land tax charged on the land, and both documents with duplicate plans are then sent to the Registrar of Land Tax, who prepares a certificate of the contract for signature by the Commissioners of Inland Revenue, and notifies the redemptioner of the price of redemption, and to what officer of Inland Revenue he should pay it. On payment, the officer indorses his receipt on the contract, and it is then returned to Somerset House for registration, a certificate whereof is indorsed with a statement of the date from which the exoneration begins (see 42 Geo. III. c. 116, ss. 36–38; 53 Geo. III. c. 123, ss. 10, 11, 12, 44; Scheds. A 2, B, E).

The registration of the contract is made without fee by the Registrar of Land Tax at Somerset House, who prepares and issues three copies of the entry, and transmits one to the Queen's Remembrancer, one to the Inspector of Taxes, and one to the Land Tax Commissioners for the district in which the exonerated land lies. The copies are sufficient evidence of the contract (42 Geo. III. c. 116, ss. 164, 165). In the event of disputes as to

the exact lands exonerated, it is for the commissioners to produce affirmative evidence that the lands specified in the contract were not really exonerated (*Bushanan v. Poppleton*, 1858, 27 L. J. C. P. 210; *Hodgson v. Pearson*, 1874, 31 L. T. 682).

No stamp duty is payable on contracts, transfers of stock, copies of registers, certificates or receipts, or affidavits given, made, or executed for purposes of redemption (1802, s. 173). As to stamps on mortgages and sales, see 1802, ss. 68, 81; 1805, s. 1. These exemptions are preserved by sec. 1 of the Stamp Act, 1891 (c. 39).

Proceedings for redemption can be completed even if the redemptioner dies before paying in full (42 Geo. III. c. 116, s. 166). They are not affected by appeals against the assessment on which they are founded (s. 129), unless on the appeal it is found that the redemptioner's land tax has, within three years, been reduced by his fraud (s. 130).

Errors discovered by the Inland Revenue in a contract may be corrected or a new contract made (53 Geo. III. c. 123, s. 21), and a redemption effected by fraud is invalid (*Beadon v. King*, 1853, 22 L. J. Ch. 111).

Where a contract cannot be completed, the Inland Revenue may rescind it (57 Geo. III. c. 100, s. 23).

If the redemptioner makes default in paying, the contract becomes void, and the land tax revives, and may be reassessed or resold, subject to a power in the High Court to enlarge the time for payment, and, with the consent of the Treasury, to remit penalties under £50 (42 Geo. III. c. 116, ss. 167-170; 53 Geo. III. c. 123, s. 8).

*Effect of Redemption.*—Assessments of tax on redeemed and exonerated property may be treated as a nullity (*Charleton v. Alway*, 1840, 11 Ad. & E. 993). Redemption of the land tax enures to the benefit of the landlord, and not of the tenant at a rack-rent, where the latter has covenanted to pay the tax (42 Geo. III. c. 116, s. 126), and where the tenancy is under a beneficial lease, and part of the land is sold, the tax continues as a rent-charge on the rest (s. 118) in favour of the lessors.

Land tax redeemed on lands belonging to the Crown or the Duchies of Cornwall or Lancaster is treated as rent recoverable against the immediate lessees (42 Geo. III. c. 116, ss. 141, 149).

When land tax has been redeemed on lands, subsequent allotments of common or waste land, in respect of rights appurtenant to the redeemed lands, are exonerated from tax (*Boehm v. Wood*, 1823, 1 Turn. & R. 332).

The same rule applies to allotments of exonerated land on partition between co-owners (42 Geo. III. c. 116, s. 39), and on exchanges (*Cooch v. Walden*, 1877, 46 L. J. Ch. 639), and in the case of inclosure of waste lands of a manor after the manor has been exonerated on redemption (*Hodgson v. Pearson*, 1874, 31 L. T. 682), allotment in lieu of rent-charge.

*Rent-Charges.*—Besides the rent-charges already referred to, on the sale of part of the lands of any non-ecclesiastical corporation or person to obtain money for redemption of tax on the whole, the unsold parts become subject to a rent-charge equal to the amount of tax thereon (1802, s. 118), and any fee-farm rent created in lieu of land tax may be charged on part only of the exonerated lands, if the annual value of the part charged is equal to thrice the value of the fee-farm rent (1802, c. 116, s. 155).

The remedy for recovery of interest, rent, or rent-charges substituted for redeemed land tax is the same as for recovery of rent under a lease, and the sums due are payable on the same days as those on which the tax was payable (42 Geo. III. c. 116, ss. 116, 125). The occupier is primarily

liable, subject to a right to deduct it from his rent where he has under the contract of tenancy agreed to pay it (42 Geo. III. c. 116, ss. 126, 127).

*Mortgages.*—Under the Act of 1802, mortgages or charges effected to obtain money for redemption of land tax had priority over all other charges only as to the interest secured, and not as to the principal, and not more than one year's interest or one year's arrears of a rent-charge could be recovered from the reversioner (42 Geo. III. c. 116, ss. 114, 115).

Mortgages effected under the Act of 1896, if registered under 51 & 52 Vict. c. 51, have priority over all other charges and incumbrances, and are real securities for purposes of investing trust funds (1896, c. 28, s. 33 (a)).

*Application of Redemption Moneys.*—When stock was transferred to the National Debt Commissioners under contracts to redeem land tax, it was cancelled (see 53 Geo. III. c. 123, s. 14). Moneys received on account of redemption or sale of land tax by officers of Inland Revenue are paid into the Bank of England to the account of the National Debt Commissioners (53 Geo. III. c. 123, s. 13; 59 & 60 Vict. c. 28, s. 40). Where the money is properly received under such contracts, it is applied in redeeming and cancelling any parliamentary stock chargeable on the Consolidated Fund (16 & 17 Vict. c. 90, s. 8). Where it has not properly been received, it is repayable on certificate of the Inland Revenue (42 Geo. III. c. 116, s. 171; 59 & 60 Vict. c. 28, s. 40).

[*Authorities.*—Bourdin on *Land Tax*, 4th ed., by Atchison, 1894; Atchison on Part VI. of Finance Act, 1896, 1897.]

**Land Transfer.**—The subject of the simplification and cheapening of the transfer of land has been under continuous discussion during the last half-century, and an important attempt in this direction has recently been made in the passing of the Land Transfer Act, 1897. For the purpose of the present article, "land transfer" is taken in a special sense as referring to conveyancing by registration of title, in contra-distinction to private conveyancing by deed. See CONVEYANCING PRACTICE; VESTING ORDERS.

In 1854 a Royal Commission was appointed to inquire into the subject, and by their report, issued in 1857, they recommended the establishment of a system under which the fee-simple title alone would be capable of registration. This point in their scheme, however, was not adopted by the Transfer of Land Act, 1862 (25 & 26 Vict. c. 53), known as Lord Westbury's Act; and although application for registration under it could only be made by persons having the control of the fee, yet the register was to show "all the estates, powers, and interests" that existed or that might arise. The Act provided for registration either of an indefeasible title, or of a title which, under certain recorded circumstances, would become indefeasible (s. 25); and by an indefeasible title was meant such a title "as a Court of equity would hold to be a valid marketable title" (s. 5); and for the purpose of the description to be entered in the register, the boundaries of the land had to be accurately determined (ss. 7, 10). After the description had been settled, and the title proved to the satisfaction of the registrar, notice of the intention to register had to be advertised and served on all the adjoining occupiers and owners (ss. 11, 12). The registered land might, with the consent of all persons interested, be withdrawn from the register (s. 34).

It is unnecessary to notice further the provisions of the Act, since the expense and delay to which its requirements gave rise speedily brought about its failure. In 1866 the number of titles registered was one hundred and five, and this was the best year. In 1870 the number had

fallen to twenty-nine, and in 1875 it was four. In 1868 a Royal Commission was appointed to inquire into the causes of failure, and in 1870 a report was issued repeating the recommendation of 1857, that only the absolute ownership should be registered. Other points suggested were, that a title might be registered as valid only from a date chosen by the owner, and that the register should not attempt to fix the boundaries, the owner being required merely to furnish the best description he could. Upon the lines of this report Lord Cairns' Act, the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), was passed. It put an end to applications for registration under the Act of 1862 (s. 125), though the earlier system is still in force for the purpose of dealings with land which remains registered under it. Registration under the Act of 1875, as under that of 1862, was voluntary. The main feature of the new system was the classification of titles as absolute, qualified, or possessory. A qualified title is a title which would be absolute but for some specified defect which is entered on the register. A possessory title does not prejudice adverse estates or interests, subsisting or capable of arising at the time of registration; but otherwise it has the same effect as an absolute title (s. 8). Any person entitled to, or having a power of sale over, the fee-simple for his own benefit can apply to be registered as proprietor, and can be placed on the register as proprietor of the fee, with an absolute, qualified, or possessory title (s. 5). Provision is also made for the registration of leaseholds (s. 11). The registered land is subject to various public burdens, such as succession duty and land tax; to easements, rights to mines and minerals, and certain other rights; and to occupation leases not exceeding twenty-one years (s. 18). Notices of trusts are not received by the registrar, but unregistered interests may be protected by notices, cautions, and inhibitions (ss. 49-57). Land certificates are issued (s. 10), and an equitable mortgage can be created by deposit of the land certificate (s. 81).

The authors of the Act of 1875 hoped to obviate the practical difficulties incident to the working of the Act of 1862, by providing that the registrar might accept a good "holding title" as sufficient for the registration of an absolute title (s. 17 (3)); and that the description of the land upon the register should not be conclusive as to the boundaries or extent of the registered land (s. 83). But in spite of these relaxations the Act was as much a failure as its predecessor. Down to December 1885 only one hundred and thirteen titles had been registered under it, of which seventeen were leasehold. The result may have been partly due to the omission of the Act to provide, like the Act of 1862, for the removal of titles once registered. It was proposed to overcome the disinclination to adopt the system by making registration compulsory, and the proposal was considered by a Select Committee of the House of Commons which was appointed in 1878. But they reported in 1879 that the real difficulty lay in the complications of conveyancing and of the land laws, and that, before compulsion could be thought of, these complications must be removed. A series of recommendations were made to secure this object, and, although they have not all been adopted, very considerable simplifications and reforms were shortly afterwards effected by the Solicitors' Remuneration Act, 1881, the Conveyancing Act, 1881, and the Settled Land Act, 1882. The last Act was specially important for purposes of registration, since it conferred upon the tenant for life power of disposition over the fee, and thus prepared the way for his being registered as proprietor.

Neither these changes, however, nor the improvements in the practice of the land registry which were effected by new rules issued in 1889,

materially accelerated the voluntary adoption of registration under the Act of 1875, and a Bill providing for compulsory registration was introduced by Lord Halsbury, when Lord Chancellor, in 1887 and 1888, and, with modifications, by his successor, Lord Herschell, in 1893, 1894, and 1895. The opposition came chiefly from the solicitors who, as a body, viewed the measure with distrust, based upon the inconveniences to which the Acts of 1862 and 1875 had in practice been found to give rise. The grounds of complaint were set forth in the evidence given before a Select Committee of the House of Commons in 1895, and when the Bill was reintroduced by Lord Halsbury in 1897, various concessions were embodied in it. As a result, the opposition was withdrawn, and the Bill became law as the Land Transfer Act, 1897. The result is that registration under the Act of 1875 can be made compulsory, but this will only be done gradually, and the application of the Act to any district depends on the will of the County Council. The Queen may by Order in Council declare, as respects any county or part of a county mentioned in the Order, that on and after a day specified in the Order, registration of title to land is to be compulsory on sale, and thereupon a person shall not, under any conveyance on sale executed on or after the day so specified, acquire the legal estate in any freehold land in that county or part of a county until he is registered as proprietor of the land. Six months' notice of the proposed Order is to be given to the County Council of the district affected, and a draft of the Order is to accompany the notice. If within three months after the receipt of the draft, the County Council, at a meeting specially called for the purpose, at which two-thirds of the whole number of members are present, resolve that in their opinion compulsory registration of title would not be desirable in their county, the Order is not to be made (s. 20). After the first compulsory Order has been made, no further Order is to be made for the space of three years, and then only at the express request of a County Council.

A draft Order proposing to apply the compulsory clause to the county of London was issued in November 1897, and at a special meeting of the London County Council, held on the 15th of February 1898, a motion to veto the Order was lost by a majority of seventy-three to thirty-five. In pursuance, however, of an arrangement with the County Council the Order, it is understood, will apply the Act in the first instance only to one-fourth of the county. The experimental adoption of the Act has thus been secured. Persons registering land in pursuance of the compulsory clause must register a possessory title at least (s. 20 (3)).

The Act of 1897 provides for the establishment of an insurance fund out of which compensation can be paid to persons injured by the effect of registration (s. 21). Such a fund, it is generally recognised, is essential both for the purpose of guarding against the consequences of mistake, and in order to justify a departure from the requirement of strict proof of title which was the cause of the failure of Lord Westbury's Act. The fund will be formed by the imposition of a small *ad valorem* fee on each registration (see Second Schedule). Persons suffering loss by any error or omission in the register, or in consequence of an entry procured by fraud or mistake will be entitled to compensation out of the fund; but where the effect of the error, omission, or entry would be to deprive a person of land of which he is in possession, the register is to be rectified, and the person suffering loss by the rectification will receive compensation (s. 7). The Act also simplifies the law of real property by providing for the establishment of a real representative (Part I.) (see REAL REPRESENTATIVE), and makes various amendments in the Land Transfer Act, 1875, including provision for the

registration of settled estates (s. 6), for making equitable mortgages by deposit of the land certificate effectual (s. 8), and for enabling land registered in a district where registration has not been made compulsory to be removed from the register (s. 17).

A system of registration, known as the Torrens system, was introduced in South Australia in 1858 at the instance of Sir Robert Torrens, and, having proved rapidly successful, it has been extensively adopted in the other Australasian colonies and elsewhere. In South Australia it is now embodied in the Real Property Acts, 1886 and 1893. Registration under it is compulsory in the case of lands newly granted by the Crown in fee, but voluntary as to lands granted before the system came into operation. The applicant for registration is registered, after approval of his title, with a title which is indefeasible, subject to exceptions for fraud and in certain other specified cases. The register consists of the original certificate of title bound together, duplicates only being issued to the registered proprietor. The system is supplemented by an insurance fund. The success of registration in the colonies has been as marked as its failure hitherto in England. To some extent the difference is due doubtless to the greater simplicity of titles in the colonies, titles there commencing with recent Crown grants, and to the comparative rarity of settlements. Whether, in spite of the difficulties which spring from complicated titles and the prevalence of settlements, it is possible by compulsion to make registration acceptable to English landowners, can only be known by the issue of the experiment now being made.

[*Authorities.*—See *Land Transfer*, published by order of the Bar Committee, 1886; *Registration of Title to Land*, C. F. Brickdale, 1886; *Land and Mortgage Registration*, R. B. Morris, 1895, where a complete list of the literature of the subject is given, pp. 1-4; and see REGISTRATION OF TITLE.]

**Land used for Building Purposes.**—This phrase, occurring in sec. 128 of the Lands Clauses Consolidation Act, 1845, is not the same as "building land"; it means "land actually used for building purposes, not land contemplated to be used for building purposes, or intended to be used for building purposes, or thoroughly suitable for building purposes" (per Lord Hatherley, L.C., in *L. & S.-W. Ry. Co. v. Blackmore*, 1870, L. R. 4 H. L. 610, at pp. 616, 617). It may include, however, gardens of a reasonable size, or a reasonable amount of curtilage, if connected with houses (*ibid.*). In *Coventry v. London, Brighton, & South Coast Ry. Co.*, 1867, L. R. 5 Eq. 104, the phrase was held to mean land sold as building land, or let on building leases, if actually laid out for building (see also *Carington v. Wycombe Ry. Co.*, 1868, L. R. 3 Ch. 377).

**Land Waiter.**—A name formerly given to searchers attached to the Customs (*q.v.*).

**Lapse.**—The failure of a devise or bequest by the death of the devisee or legatee in the lifetime of the testator is called a lapse. See LEGACY.

By the Wills Act, 1837, s. 32, it is provided "that where any person to whom any real estate shall be devised for an estate tail or an estate in



quasi-entail shall die in the lifetime of the testator leaving issue, who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." As to sec. 33, see LEGACY, VI. *post*, and note the following additional points.

This section does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, and therefore disposable by his will, notwithstanding his death before the testator (*Johnson v. Johnson*, 1843, 3 Hare, 157); or, in the event of such devisee or legatee dying intestate, the gift will pass to his heir-at-law or next-of-kin (*Wisden v. Wisden*, 1854, 2 Sm. & G. 396). The section applies only to cases of strict lapse, not to the case of gifts to children or other issue as a class (*Olney v. Bates*, 1855, 3 Drew. 319; *Browne v. Hammond*, 1858, John. 210), even where, as the events happen, the class consists of but one individual (*In re Harvey's Estate*, *Harvey v. Gillow*, [1893] 1 Ch. 567). Nor does it apply to a testamentary appointment under a power to appoint among the testator's children (*Griffiths v. Gale*, 1844, 12 Sim. 354); it applies, however, where the appointment is made in the exercise of a general power (*Eccles v. Cheyne*, 1856, 2 Kay & J. 676).

Unless a contrary intention appears by the will, lapsed and void devises pass to the residuary devisee (Wills Act, s. 25), in the same way that lapsed legacies fall into the residue and belong to the residuary legatee. See LEGACY; WILL.

[*Authorities*.—Hayes and Jarman, *Forms of Wills*, 10th ed., pp. 92–94, and authorities cited at end of article LEGACY.]

## Larceny.

### TABLE OF CONTENTS.

PRELIMINARY . . . . .	306	6. Theft on Ships, etc. . . . .	315
THE OFFENCE . . . . .	308	7. Robbery . . . . .	315
1. Ownership . . . . .	308	8. Accessories and Receivers . . . . .	316
2. What can be stolen . . . . .	310	9. Attempts to steal . . . . .	317
3. The guilty act . . . . .	312	PROCEDURE . . . . .	317
4. Simple Larceny . . . . .	314	1. Criminal . . . . .	317
5. Theft from Buildings . . . . .	315	2. Civil . . . . .	318

### PRELIMINARY.

Larceny (*latrocinium*) is the *nomen juris* of theft, but the name does not necessarily imply that the English conception of the offence and remedies are derived from Roman law, though, undoubtedly, evidences exist, in the early law writers, of reference to or borrowing from that source (2 Pollock and Maitland, *Hist. Eng. Law*, 492, 493).

To understand the elements of the offence it is necessary to consider to some extent the conceptions of the common law as elaborated or evolved by the judges with reference to ownership, possession, and custody, inasmuch as theft is the most important of the offences against property. The evolution of these notions has been traced out very fully in Pollock and Wright on *Possession*, to which reference must be made by those seeking a knowledge at once historical and scientific of them.

The law as it stands is made up of the definitions of the early writs,

the judicial interpretation and expansion of the ideas therein contained, to meet the infinite varieties of attacks on property; and of a mass of statutory enactments. The policy of the Legislature has been continuously and consistently to avoid the best remedy for the defects discovered by the judges, viz. to redefine theft, and preferably to adopt the method of making a statutory exception to the common law definition when, as to any particular property or set of circumstances the judges declared it defective; and, in later years, since the abolition of capital punishment, to resort to increased punishment of thefts committed under what were regarded as circumstances of aggravation. The bulk of these enactments were repealed and consolidated in 1828, and again by the Larceny Act, 1861 (24 & 25 Vict. c. 96), which with a few subsequent statutes makes up the whole of the extant statute law on the subject. The other statutes relate mainly to theft in a royal palace (33 Hen. VIII. c. 12, s. 13) and purloining by workmen (see MASTER AND SERVANT), and from the poor law authorities (1815, c. 137, s. 2; 1844, c. 101, ss. 57, 58; 1848, c. 110, s. 9; 1850, c. 101, s. 8; 1865, c. 79, s. 9). The difficulties attending comprehension of the Larceny Act, 1861, arise from the fact that the law of possession, trespass, and theft has not been reduced into a systematic form so as to make it feasible to reduce to one the crimes of theft, embezzlement, larceny by bailees, receiving and obtaining by false pretences, and so get rid of the existing web of technicalities (Pollock and Wright on *Possession*, p. 159).

The Act may be described as a *réchauffé* of the previous statutes, or a placing of them in a disorderly manner on a statutory file. The substantive law and the procedure are mixed up; and the whole compound cannot be discussed without reference to the common law, definitions of the elements of larceny being studiously omitted.

It is divided by cross-headings into the following sub-titles:—

- Interpretation of terms (s. 1).
- General provisions as to larceny, including larceny by bailees (ss. 2–9).
- Larceny of cattle or other animals (ss. 10–26).
- Larceny of written instruments (ss. 27–30).
- Larceny of things attached to or growing on land (ss. 31–37).
- Larceny from mines (ss. 38, 39).
- Larceny from the person and other like offences (ss. 40–49).
- Sacrilege, burglary, and housebreaking (ss. 50–59).
- Larceny in the house (ss. 60, 61).
- Larceny in manufactories (s. 62).
- Larceny on ships, wharves, etc. (ss. 63–66).
- Larceny or embezzlement by clerks or servants or persons in the public service (ss. 67–73).
- Larceny by tenants or lodgers (s. 74).
- Frauds by agents, bankers, or factors (ss. 75–87).
- Obtaining money, etc., by false pretences (ss. 88–90).
- Receiving goods stolen or unlawfully obtained (ss. 91–99).
- Restitution and recovery of stolen or unlawfully obtained property (ss. 100–102).
- Apprehension of offenders and other proceedings (ss. 103–113).
- Other matters (ss. 114–122).

The only satisfactory mode of dealing with these headings is to take the common law as to larceny, and to deal with so much of the Act as modifies it, and to relegate those parts of the Act which do not deal with theft to their proper headings, viz.—ACCOUNTS, FALSIFICATION OF, vol. i. p. 77; BURGLARY, vol. ii. p. 304; EMBEZZLEMENT, vol. iv. p. 479; FALSE PRETENCES,

vol. v. p. 315; and to collect the scattered portions of the Act as to procedure below, under the sub-head *Procedure*.

#### OFFENCES.

The *Mirror of Justice*, though its claims to authority are exposed by Mr. Maitland (7 Seld. Soc. Publ. Introd.), and though full of demurrable propositions as to the common law, admittedly contains the best early definition of theft, although in applying it the author mixes it up with all and more than all the cognate offences gathered in the Larceny Act. The definition is—"Larceny is the treacherous (*i.e. animo furandi*) taking of a corporeal moveable thing of another against the will of him to whom it belongs by evil acquisition of the possession or of the use. Taking, we say, for bailment or livery is not in the case. A corporeal moveable, we say, because of property not moveable or not corporeal, as land, rent, advowsons, there can be no larceny; 'treacherously,' we say, because if the taker believed the things to be his own so that he could well take, in such case he does not commit this sin; nor does he where he takes another's goods, believing that his taking them is agreeable to the owner; but in this case he must show some open presumption and evidence" (7 Seld. Soc. Pub. p. 25).

With this may be compared the most recent attempt at a scientific definition: "Theft is the act of dealing from any motive whatever unlawfully and without claim of right (which may be founded on a mistake of law) with anything capable of being stolen in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof" (Steph. *Dig. Cr. Law*, 5th ed., p. 254). On the whole, the primitive definition is the more intelligible, and is admitted by Sir J. Stephen to be accurate (3 *Hist. Cr. Law*, 135), as may be seen from the form of an indictment for larceny which states the essential elements of the offence.

"The jurors for our Lady the Queen on their oath present that on the 1st day of January A.D. 1898, at the parish of \_\_\_\_\_ in the county of Kent, A. B. feloniously did steal, take, and carry away one coat, etc., of the value of \_\_\_\_\_ of the goods and chattels of C. D. against the peace, etc." The word "steal" represents the *animus furandi* or intent to deprive the possessor permanently of the thing, and the absence of consent (*invito domino*). The words "take and carry away" (*cepit et asportavit*) indicate the necessity of proving actual possession and removal by the thief. The words "goods and chattels" indicate the rule as to corporeal moveables; and the words "of C. D.," the person whose right of ownership or possession is invaded by the act.

*Ownership.*—For the purposes of larceny, that man is the owner of goods who as against the taker is entitled to possession of the goods taken. The taker cannot set up *jus tertii* against such an owner unless the taking was effected with or in the belief that he had the authority of the third person (see *Armory v. Delamirie*, 1722, 1 Sm. L. C., 10th ed., 342; 2 East, P. C. 654, 697; 1 Hale, P. C. 512; Hawk., P. C., bk. i. c. 33, s. 38).

Ownership of goods in the modern sense is not a conception found in the early common law, which dealt with possession in the case of chattels and estate in the case of lands; and the proper person to pursue a thief was the bailee or possessor of the goods rather than the owner; and on conviction of the thief on indictment, the stolen goods being in possession of the thief went to the king as forfeited *catalla felonum*, and not to the injured possessor or true owner; while the bailor seems originally to have

had no civil remedy against the thief or his transferees, but only against the bailee (see 2 Pollock and Maitland, *Hist. Eng. Law*, 142-181).

Much has been said about the general and the special property in goods (see Steph. *Dig. Cr. Law*, artt. 305-308). But in substance for purposes of theft the question is not really material. A bailee who has a lien or other special right over a thing under a contract with the beneficial owner, *i.e.* the man who has lawfully got physical possession and control, has a right to them as against the beneficial owner, so long as the bailment or contract continues, and it is quite immaterial for purposes of theft whether the possessor of goods seized larcenously has or has not any real right to them. One thief can steal stolen goods from another. The only difficulty has arisen from a doubt, perhaps needlessly expressed, when goods are stolen from the custody of a servant or a bailee, whether the ownership must be laid in the servant or bailee or in the beneficial owner; and the rule seems to be that whoever could sue in trespass for the goods can be described in the indictment as owner. And in practice in indictments for theft the goods may be described as those of the bailor or of the bailee, whatever the nature of the bailment (Arch. *Cr. Pl.*, 21st ed., 48, 49). The importance of the position of servant or bailee arises only when they appropriate the goods in their custody or possession, or when the beneficial owner of the goods wrongfully retakes them.

The earlier view of the common law was that a bailee could not commit larceny because he had "possession" of the goods bailed, and could not take them *vi et armis*. In 1474 it was decided that if he broke bulk or otherwise determined the bailment and then took the goods, he committed larceny (Y. B. 13 Edw. iv. f. 9, No. 5; 3 Steph. *Hist. Cr. Law*, 139). And this remained the law as to bailees till 1857 (29 & 30 Vict. c. 54, s. 4; now 24 & 25 Vict. c. 96, s. 3, under which a bailee of any moveable property can be convicted if he steals it).

An attempt was made at an early date to draw a distinction between possession as involving control, and mere charge or custody, such as of goods handed to an innkeeper by a guest or by a master to a servant. In the end it was decided that where a servant has custody of his master's goods, the possession continues in the master (*R. v. Walsh*, 1812, 2 Leach, 1072). In the case of servants the doubts were so considerable that they led to legislation in 1529 (21 Hen. viii. c. 7). See EMBEZZLEMENT. But the law has had a curious history in this respect, as the offence of larceny by a clerk or servant has superseded that Act, and the term "embezzlement" there used has now been applied to a different kind of offence.

Under the Larceny Act, 1861, larceny by clerks or servants or persons in the public service or police is treated as an aggravated form of the offence, but its incidents are not altered (1861, c. 96, ss. 67, 69). Special punishment attends larceny by Customs officers (39 & 40 Vict. c. 36, s. 29) or officers of the Post Office.

The doctrine that a man can steal his own goods from a person to whom he has intrusted them is as old as 1429 (Y. B. 7 Hen. vi. f. 42, No. 18; 3 Steph. *Hist. Cr. Law*, 138). It is reasserted in East, 1 P. C. 654, 658 (see Pollock and Wright on *Possession*, 139), and has been enforced in recent times (*R. v. Wilkinson*, 1821, Russ. & R. 470; *R. v. Webster*, 1861, 31 L. J. M. C. 17; *R. v. Burgess*, 1863, 32 L. J. M. C. 185). ••

This form of larceny can, of course, only be committed where the retaking is wrongful, *i.e.* is a violation of the terms on which the goods were committed to the person who has a special property in or a lien over them.

Husband and wife being treated as one person could not steal from each

other; but they can steal from each other now when the wrongful taking is by a spouse when deserting or about to desert the other (1882, c. 75, s. 12).

The common law rule that joint beneficial owners or partners for gain could not steal goods owned in common was abolished almost but not wholly in 1868 (c. 116; *R. v. Robson*, 1886, 16 Q. B. D. 137; *R. v. Butterworth*, 1873, 12 Cox C. C. 132). It never applied to members of a corporate body, which is a distinct entity from its component individuals, and certain banking partnerships had been excepted in 1840 (3 & 4 Vict. c. 111); nor did it apply when the joint-owner took the property from a bailee or servant (*R. v. Bramley*, 1822, Russ. & R. 478; *R. v. Webster*, 1861, 31 L. J. M. C. 17; *R. v. Burgess*, 1863, 32 L. J. M. C. 185).

*What can be stolen.*—At common law a thing could not be stolen unless (1) it was a moveable chose in possession, such as money, goods, and merchandise or chattels; (2) it could be and was owned or possessed; (3) it had some intrinsic value to its possessor not necessarily estimable in coin (*R. v. Morris*, 1840, 9 Car. & P. 349).

1. Nothing attached to the realty could be stolen if the severance and the taking away were a single transaction. But if the severance were effected and subsequently the thing severed was taken, it had ceased to savour of the realty, and the taking could be theft. The extremest decision on this point is that in which a man was convicted of digging up the buried carcass of a diseased pig, which was held not to savour sufficiently of the realty to exempt the taker from the law as to theft (*R. v. Edwards*, 1877, 13 Cox C. C. 384; see Mayne, *Ind. Cr. Law*, 1896, p. 669). The Larceny Act, 1861, alters the law on this subject in certain respects. A person is guilty of felony and liable to be punished as for simple larceny, who—(1) steals or rips, cuts, severs, or breaks, with intent to steal, glass or woodwork belonging to a building or metal utensils or fixtures fixed to a building or metal fixed in private land, or for a fence to a dwelling-house, garden, or area, or in a square or street or a place dedicated to public use or ornament or in a burial ground (s. 31).

(2) Steals or cuts, breaks, roots up, or otherwise destroys or damages, with intent to steal, trees, saplings, shrubs, or underwood of a value over £1, if growing in parks, pleasure grounds, orchards, or avenues, or in ground adjoining a dwelling-house, and over £5 if growing elsewhere (s. 32).

(3) Stealing, etc., trees and the like over the value of 1s. wherever they grow is summarily punishable for the first offence by fine not exceeding £5, over and above the value of the things; for the second, by imprisonment for not over twelve months; and a third offence is felony punishable as simple larceny (s. 33).

(4) Stealing live and dead fences, wooden fences, gates, or stiles is summarily punishable as (3) on a first or second offence (s. 34); and unlawful possession of any of the vegetable products above mentioned is summarily punishable (s. 35).

(5) Stealing, etc., vegetable products not already named, if in gardens and like places, is summarily punishable by fine not exceeding £20, or by imprisonment with or without hard labour for not over six months on a first conviction. Repetition of the offence after a previous conviction is an indictable felony, punishable as simple larceny (s. 36).

(6) Stealing cultivated roots or plants not in gardens or like places is summarily punishable (i.) for a first offence or summary conviction by fine not exceeding 20s.; and (ii.) on an offence after a previous conviction by imprisonment with or without hard labour for not over six months.

(7) Stealing or severing with intent to steal ore, etc., from a mine is a felony punishable by imprisonment with or without hard labour for not over two years (s. 38).

(8) Taking, removing, or concealing ore, etc., by persons employed about the mine with intent to defraud proprietors, adventurers, or fellow-workmen, though not larceny, is a felony punishable as (7) (s. 39; see *R. v. Webb*, 1835, 1 Moo. C. C. 431).

All these exceptions, except the last, relate to things attached to the soil. They are distinguished by the intent implied in the word "steal" from the similar offences gathered under MALICIOUS DAMAGE. Where the things enumerated have been severed from the soil, they may be stolen at common law, unless the severance and appropriation form part of one continuous transaction (*R. v. Towneley*, 1870, L. R. 1 C. C. R. 315; *R. v. Read*, 1877, 3 Q. B. D. 131; *R. v. Foley*, 1891, 26 L. R. Ir. 299).

2. The second rule lets in domestic animals, but excludes animals of a base nature, and animals *feræ naturæ* which have not been reduced into possession by domestication, capture, or killing, even if they are on land over which the taker has no right to go (*Blades v. Higgs*, 1865, 11 H. L. 621). In the case of theft of animals, the words *abduxit* or *effugavit* (led or drove) were substituted for *asportavit*.

The statutory provisions on the subject are numerous. Sec. 10 of the Larceny Act, 1861, provides for a severer punishment for stealing the live cattle there enumerated, viz. penal servitude from three to fourteen years, than is awarded for simple larceny. Secs. 11–17 deal with deer, hares, and rabbits, and are treated under GAME LAWS (vol. vi. p. 40). Secs. 18–20, 22 deal with dogs, which at common law could not be stolen (see DOGS). Secs. 21, 22, 23 deal with beasts and birds ordinarily kept in confinement (see ANIMALS; BIRDS). Secs. 24 and 25 deal with fresh-water fisheries (see FISHERIES); and sec. 26 with theft of oysters or oyster-brood from a private marked and known fishery.

There is no right of ownership in a human body, alive or dead, so that it is not theft to carry off a serf or child or person not *sui juris*; nor is body-snatching theft, though it is theft to steal the shroud in which a corpse is wrapped; and so far as decided cases go, anatomical specimens cannot be stolen (3 Steph. Hist. Cr. Law, 127). See ABDUCTION; CORPSE; KIDNAPPING.

On the other hand, gas and water in pipes and electricity in wires can be stolen (*Ferens v. O'Brien*, 1885, 11 Q. B. D. 21; *R. v. White*, 1853, 22 L. J. M. C. 123; 10 & 11 Vict. c. 15, s. 18; 26 & 27 Vict. c. 93, s. 20; 45 & 46 Vict. c. 56, s. 23).

The thing must not only be capable of ownership, but must be owned or possessed when taken. It is not therefore theft to appropriate things abandoned by the owner.

3. *Value*.—As already stated, nothing can be stolen which has not an intrinsic value. It is not necessarily computable in coin (*R. v. Morris*, 1840, 9 Car. & P. 349); and the interred carcass of a diseased pig has been held worth enough to be stolen (*R. v. Edwards*, 1877, 13 Cox C. C. 384). The value is not now material, except where a special value is named in a statute as an ingredient in the offence or an aggravation of punishment. See INDICTMENT.

But the common law rule excluded documents of title to lands as having no intrinsic value, being only evidence of title (and as savouring too much of the realty); and choses in action, even bank notes, and negotiable instruments (*R. v. Morrison*, 1861, Bell's C. C. 164).

This defect has been amended by the following enactments incorporated in the Larceny Act, 1861:—

(a) To steal or for a fraudulent purpose to destroy, cancel, or obliterate wholly or in part any valuable security other than a document of title to lands, is a felony of the same nature and degree, and punishable in the same way as if the valuable security had been a chattel of the like value with the share, interest, or deposit to which the security relates, or the money due thereon on the goods or other valuable thing represented, mentioned, or referred to in the security (1861, c. 96, s. 27).

(b) The like acts, if done to a document of title to lands, are felonies punishable by penal servitude from five to three years (1861, c. 96, ss. 1, 28; 1891, c. 69, s. 1).

(c) The like acts, if done to a testamentary instrument before or after the testator's death, and whether the instrument relates to realty or personalty, are felonies punishable by penal servitude for life, or not less than three years (1861, c. 96, ss. 1, 29; 1891, c. 69, s. 1).

(d) Theft, fraudulent removal, or obliteration of records or other legal documents relating to Courts of justice, are felonies punishable by penal servitude from three to five years (1861, c. 96, s. 30; 1891, c. 69, s. 1).

In cases (c) and (d) it is not necessary to state in the indictment to whom the testamentary or legal instrument belongs (c. 96, ss. 29, 30). In case (d) the theft was punishable at common law, so far as concerned the parchment on which the record was written, if it did not relate to land (*R. v. Walker*, 1827, 1 Moo. C. C. 155). But the statutory offence extends much further (*R. v. Bailey*, 1871, L. R. 1 C. C. R. 347).

Thefts were at common law classified as petty or grand larceny for purposes of trial and punishment according as the thing stolen was or was not worth 1s. (3 Edw. 1. c. 15). Petty larceny was usually punished by whipping. Grand larceny was capital (see *BENEFIT OF CLERGY*, vol. ii. p. 59). Since 1827, this distinction has been abolished (7 & 8 Geo. IV. c. 28, s. 2; 1861, c. 96, s. 2).

*The guilty act.*—To constitute theft, the goods must be taken and carried away with dishonest intent (*felonice et animo furandi cepit et asportavit*), and without the possessor's consent (*invito domino*).

The thief must do some act showing an intention to appropriate the chattel, and exercise an active dominion over it (*R. v. Trebilcock*, 1858, 27 L. J. M. C. 103). Removing goods out of a burning house to save them for the owner is not theft (*R. v. Leigh*, 1800, 2 East, P. C. 694).

There must be proof of some act amounting to removing or carrying away (*asportatio*) from the place in which the goods were, and involving for the instant at least entire and absolute physical possession of the goods (*Cherry's case*, 1781, 2 East, P. C. 556; *R. v. Poynton*, 1862, 32 L. J. M. C. 29).

But in this connection it is not necessary to prove that the thing taken was in the physical possession of the owner. When it is on his person or in his dwelling-house, the taking is specially punishable. But it is just as much theft to take a man's domestic animal when it is out on his field or on a common or gone astray, as if it were taken out of his house or curtilage; and if goods are mislaid or lost, it is theft to appropriate them without proper inquiry (1 Hale, P. C. 506; 2 East, P. C. 664; *R. v. Kerr*, 1837, 8 Car. & P. 176; *R. v. Rowe*, 1859, 28 L. J. M. C. 128).

From another point of view goods may remain in the legal possession of the owner where the physical custody is given to another. The plate which is supplied for the use of a guest at an hotel; the goods which are

placed in the hands of a customer at a shop, or left at his house for inspection; a horse at a livery stable, which a professing purchaser is allowed to mount in order to try his paces, still remain in the possession of the owner (*Mayne, Ind. Cr. Law*, 1896, p. 669; *R. v. Thompson*, 1862, 32 L. J. M. C. 53; *R. v. Cooke*, L. R. 1 C. C. R. 295).

Theft in these cases may be treated as larceny by a bailee; but where the transfer is not equivalent to a delivery, either possession is not changed at all, or only a trespassory possession is acquired, and the taker could be indicted independently (cp. 24 & 25 Vict. c. 96, s. 3. See Pollock and Wright, 109, 110).

Possession may be transferred for purposes of custody only, i.e. by way of bailment. A bailee is a person who, otherwise than as a servant, receives possession of a thing for another, or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing, or to convey or apply the specific thing according to the directions, antecedent or future, of the other person. An infant can be convicted of larceny as a bailee (*R. v. M'Donald*, 1885, 15 Q. B. D. 323; Pollock and Wright on *Possession*, 163).

The kinds of taking are commonly but unfortunately described as "actual taking," as in ordinary theft or robbery, or "constructive taking" (Arch., 21st ed., 385).

By the latter it is meant to include cases—

- (1) Where delivery does not alter the possession in law;
- (2) Where the possession is obtained *animo furandi*;
- (3) Where both possession and property are passed;
- (4) Where physical possession is honestly obtained, and the goods are subsequently misappropriated.

It is probably better to lay aside this classification, and to consider the taking as meaning an act of appropriation without the consent of the owner.

By "without the consent of the owner" is meant that the taking is either—

- (1) Absolutely without the owner's knowledge or assent, the ordinary case of taking by stealth or purse-snatching (*R. v. Davies*, 1712, 2 East, P. C. 709).

- (2) Assented to under threats or force, as in robbery.

- (3) Facilitated merely for the purpose of entrapping the thief (*R. v. Eggington*, 1801, 2 East, P. C. 666).

- (4) Effected by a trick which induces the possessor to part with custody, but not with the property, or the legal right to immediate possession (*R. v. M'Kale*, 1868, L. R. 1 C. C. R. 129; *R. v. Buckmaster*, 1887, 20 Q. B. D. 182; *R. v. Russell*, [1892] 2 Q. B. 312; *Cundy v. Lindsay*, 1878, 3 App. Cas. 439).

- (5) Effected by taking advantage of a mistake not induced by a trick, but known by the thief to have been made, and of such a nature as to rebut any presumption that property was intended to pass. Under this head much controversy of a somewhat metaphysical kind has arisen; the judges seeking by such considerations to extend the conception of theft to any dishonest appropriation. It covers cases where, on the sale of goods, property not included in the sale is delivered and appropriated (*Merry v. Green*, 1841, 7 Mee. & W. 623).

- (6) By taking things lost or mislaid by the owner, with knowledge that he has not abandoned his rights of ownership (*R. v. West*, 1854, 24 L. J. M. C. 4; *R. v. Moore*, 1860, 30 L. J. M. C. 77; *R. v. Glyde*, 1868,



*L. R. 1 C. C. R. 139*). In such a case, though the owner may not have abandoned his rights, the taker is not guilty unless he took it believing at the time that he could find the owner (*R. v. Knight*, 1871, 12 Cox C. C. 102; *R. v. Matthews*, 1873, 12 Cox C. C. 489).

In none of these cases, except in the case of bailments, is theft committed by the original owner or his deputy voluntarily, even though induced by fraud, transferred not merely physical possession but the general ownership of the thing, or if the recipient received physical possession without fraud or intent to steal, and subsequently dealt dishonestly with the goods possessed (*R. v. Macgrath*, 1869, L. R. 1 C. C. R. 265; *R. v. Prince*, 1868, L. R. 1 C. C. R. 150; *R. v. Middleton*, 1873, L. R. 2 C. C. R. 38).

Where things which can be stolen are handed over to another in belief that he is a particular person, there is no delivery or receipt in accordance with intention, and no transfer of property or lawful possession (*R. v. Middleton*, 1873, L. R. 2 C. C. R. 38; *Cundy v. Lindsay*, 1878, 3 App. Cas. 439; *Vilmont v. Bentley*, 1887, 12 App. Cas. 471).

The same rule applies as to an article delivered in mistake as to its nature (*R. v. Ashwell*, 1885, 16 Q. B. D. 190; *R. v. Flowers*, 1886, 16 Q. B. D. 693; *R. v. Hehir*, 1895, 2 Ir. Rep. 709), and as to goods inadvertently mixed with those of another (*R. v. Riley*, 1851, 22 L. J. M. C. 48).

But this does not *per se* make the taking theft. The receipt may be excusable, but deliberate subsequent appropriation of the thing with intent to deprive the owner of it, and with clear knowledge that the recipient was not meant to receive it in his own right, is theft.

In all cases the taking to be criminal must be *animo furandi* on which the jury must pronounce (*R. v. Farnborough*, [1895] 2 Q. B. 484). It is not theft if the goods belong to the taker and he has the immediate right of possession, nor if he take them under a claim of right even if founded on a mistake of law or otherwise under colour of a right superior to that of the possessor (*Hewson v. Gamble*, 1892, 56 J. P. 534). But it is theft if the taking is deliberate and not under mistake, and is not for a temporary purpose but with intent to deprive the owner or possessor permanently of his rights, whether done for the gain of the taker or not (*Arch. Cr. Pl.*, 21st ed., pp. 377-381).

The general nature of larceny having been stated with reference to certain statutory modifications or aggravations, it is necessary still to refer to certain particular offences.

*Simple Larceny*.—Lord Hale uses the term “simple larceny” as meaning theft without violence. In the Act of 1861 it is used without definition, apparently as representing the union of the two common law varieties of theft, as distinguished from compound or mixed larceny, which appears to mean offences committed under circumstances which entail under statute an increased penalty, or committed with other offences. The distinction corresponds closely to that made in the French Penal Code between *vol simple* and *vol qualifié* (and see 3 Steph. *Hist. Cr. Law*, 174).

Simple larceny is punishable on indictment by penal servitude from three to five years, or by imprisonment with or without hard labour for not over seven years. A first offence can be dealt with under the First Offenders Act, 1887, or by binding the offender to come up for judgment.

It may be tried and punished summarily in certain cases, under secs. 41-46 of the Summary Jurisdiction Act, 1879.

Simple larceny after a previous conviction (whether summarily or on indictment) of felony is punishable by penal servitude from three to ten

years, and after a previous conviction of an indictable misdemeanour within the Larceny Act, 1861, by penal servitude from three to seven years (1861, c. 96, ss. 7, 8; 1879, c. 49, s. 14). Male offenders under sixteen may in each case be whipped.

*Theft from Buildings.*—Theft from a building was in early days treated as distinct from ordinary theft, and was termed *hamesocn*, *hame fare*, or *hus-brice*. The offence and its modern equivalents are discussed under BURGLARY, vol. ii. p. 304.

Theft of certain goods of the value of 10s. whilst laid, placed, or exposed during any stage, process, or progress of manufacture in a building, field, or other place, is felony punishable by penal servitude from three to fourteen years (1896, c. 96, s. 62). The goods within the enactment are those composed of silk, wool, flax, cotton, alpaca, or mohair only. The offence is merely an aggravation of simple larceny, and on an indictment for it the accused may be convicted of simple larceny.

*Theft on or from Ships, Wharfs, Havens, etc.*—It is a felony punishable by penal servitude from three to fourteen years to steal any goods or merchandise on a vessel, barge, or boat of any description in a haven or port of entry or discharge, or on a navigable river or canal, or on a creek or basin belonging to or communicating with such haven, port, river, or canal, or from a dock, wharf, or quay adjacent thereto. The term "merchandise" appears to include passengers' luggage (*R. v. Wright*, 1835, 7 Car. & P. 159). The goods must be stolen in the vessel, but the offence is complete without removal from the vessel. It is said that the master of a ship being bailee of the cargo is not within this enactment (*R. v. Maden*, 1805, Russ. & R. 92); and it does not apply to vessels on the high seas, thefts on which are governed by sec. 11 of the Act of 1861.

Theft of wreck was not larceny at common law if the owner was unknown (Hawk., P. C., bk. i. c. 33, s. 38). But it is felony punishable by penal servitude from three to fourteen years to plunder or steal from a ship in distress or wrecked or stranded, whether the act consists in taking part of the ship or goods or merchandise, or articles belonging to the ship (1861, c. 96, s. 64; 1891, c. 69, s. 1). Persons found in possession of shipwrecked goods are liable to summary conviction and punishment if they cannot satisfactorily explain how they came by them; and shipwrecked goods offered for sale may be seized by officers of customs or excise and the police, and taken before justices, who, if not satisfied that they were lawfully come by, may order their delivery to the rightful owner on payment of a reward, if the justices think fit, to the person seizing (1861, c. 96, ss. 65, 66). See also WRECK.

*Robbery.*—Robbery was under the old law treated as distinct from theft, and was a capital felony (2 Pollock and Maitland, *Hist. Eng. Law*, 492). The term has always denoted taking goods or money from the person of another by violence or intimidation (2 East, P. C. 707), which may include threats to accuse of crime (*R. v. Stringer*, 1842, 2 Moo. C. C. 261). The value of the thing taken was immaterial. Robbery did not include taking from the person by trick or stealth. In other words, to constitute robbery there must be intentional trespass to the person as well as trespass to goods, by some actual violence or intimidation to the possessor of the goods, or some other person, to overcome or prevent resistance and enable the robber to take the goods from the person or immediate presence of the possessor (Steph. *Dig. Cr. Law*, 5th ed., p. 256; *R. v. Edwards*, 1842, 4 Cox C. C. 32; *R. v. Hughes*, 1825, 1 Lew. C. C. 301).

It is different from theft from the person, which does not involve

violence or intimidation; but with an extension of the law so as to cover "valuable securities." Both are dealt with in the same section of the Larceny Act, and both offences are now punishable by penal servitude from three to fourteen years (1861, c. 96, s. 40; 1891, c. 69, s. 1). Assault with intent to rob is punishable by penal servitude from three to five years (1861, c. 96, s. 41; 1891, c. 69, s. 1). Robbery under arms or assault under arms with intent to rob, and gang robbery or assault by a gang with intent to rob, are punishable by penal servitude for life or not less than three years, to which flogging may be added (1861, c. 96, s. 42; 1863, c. 44; 1891, c. 69, s. 1).

Demanding money, etc., by menaces or force, with intent to steal, is a felony punishable by penal servitude from three to five years (1861, c. 96, s. 45; 1891, c. 69, s. 1). The offence can be committed only when the property demanded is or is believed at the time of the demand to be in the physical possession of the person from whom it is demanded (*R. v. Dunkley*, 1825, 1 Moo. C. C. 90; *R. v. Edwards*, 1834, 6 Car. & P. 515). The nature of the menaces necessary to constitute these and cognate offences is dealt with under MENACES.

*Accessories and Receivers.*—The general law as to accessories before and after the fact is dealt with under ACCESSORY. Accessories are also punishable under the Larceny Act (c. 96, s. 98).

The common law recognised an offence known as THEFT BOTE, which consisted in forbearing to prosecute in consideration of receiving back the stolen goods. This was a form of MISPRISON of felony (2 Steph. *Hist. Cr. Law*, 238). It is still punishable as compounding a felony (*R. v. Burgess*, 1885, 16 Q. B. D. 141). See HUSH MONEY.

Where property has been feloniously stolen, a person who receives it with knowledge that it has been stolen is guilty of a felony, and may be indicted as for a substantive felony or as an accessory after the fact (1861, c. 94, s. 3; c. 96, ss. 91, 93). This does not preclude a right to indict the receiver as an accessory *before* the fact (*R. v. Hughes*, 1860, 29 L. J. M. C. 71).

Where the taking is a misdemeanour under the Larceny Act, the receiving is also a misdemeanour (c. 96, s. 95). Where the principal offence is punishable on summary conviction, the receiving is also so punishable (s. 97).

To warrant a conviction of receiving stolen goods, the goods must be received before they have got back into the possession of the rightful possessor (*R. v. Villensky*, [1892] 2 Q. B. 597), and the original taking must be a felony at common law or an offence under the Larceny Act, 1861, and theft under the Larceny by Partners Act, 1868 (31 & 32 Vict. c. 116), will not suffice (*R. v. Smith*, 1870, L. R. 1 C. C. R. 266). Receipt of goods taken by wife from husband is not "receiving," except in a case within the Married Women's Property Act, 1882 (*R. v. Kenny*, 1877, 2 Q. B. D. 307).

Receiving is complete if joint possession is in thief and receiver, but not if the exclusive right to possession remains in the thief (*R. v. Wiley*, 1850, 2 Den. Cr. C. 37; *R. v. Smith*, 1851, 20 L. J. M. C. 4; *R. v. Smith*, 1855, 24 L. J. M. C. 135), but the receipt need not be directly from the thief (*R. v. Reardon*, 1865, L. R. 1 C. C. R. 31); nor need it be effected by acquiring actual physical possession (*R. v. Smith*, *ubi supra*).

It is essential that the receiver, when he receives, should know the goods to be stolen, which may be proved by direct or circumstantial evidence, or under 34 & 35 Vict. c. 112, s. 19, or proof that the receiver was found in possession not only of the property in question, but of other

property stolen, within twelve months of the charge (*R. v. Carter*, 1884, 12 Q. B. D. 522).

Persons can be convicted of being jointly concerned in the receipt, or of being accessories to it (1861, c. 96, s. 94; *R. v. M'Athey*, 1862, 32 L. J. M. C. 35).

Where a pawnbroker is convicted of receiving stolen goods, the Court may order his licence to be cancelled (35 & 36 Vict. c. 93, s. 38).

*Attempts to steal.*—It is a misdemeanour to incite another to steal, even if the incitement has no effect (*R. v. Gregory*, 1867, L. R. 1 C. C. R. 77), or to conspire to steal.

It is a misdemeanour to attempt to steal, even if the attempt wholly fails, even if the commission of the full offence was impossible (*R. v. Ring*, 1892, 61 L. J. M. C. 116). See ATTEMPT.

#### PROCEDURE.

1. *Criminal.—Arrest.*—A thief may be apprehended without warrant by any person, and in theory the old law as to pursuit on hue and cry is still in force (50 & 51 Vict. c. 55, s. 8 (1)). The offence and the right to pursue and arrest continues in every local jurisdiction into which the thief takes the stolen goods (*Griffith v. Taylor*, 1876, 2 C. P. D. 194, 202), and this rule has been extended to cases in which the theft took place in Scotland or Ireland (1861, c. 96, s. 144); and the right of arrest for common law larceny is extended to all persons found committing an offence against the Larceny Act, 1861, except angling in the day-time (c. 96, s. 103), if the arrest is immediate (*Griffith v. Taylor, supra*).

Constables may also arrest persons loitering at night, who are suspected of having committed or being about to commit theft (1861, c. 96, s. 104).

*Venue.*—The proper jurisdiction for trial is the place where the theft was committed, or any place in which the taking (*asportavit*) is continued. In the case of theft by persons in the public service or police, the offence may be tried either where it was committed, or where the offender is arrested or is in custody (1861, c. 96, s. 70).

Receivers of stolen goods may be tried either where they have the goods in possession, or where the thief can be tried (1861, c. 96, s. 96). Where the goods were stolen outside the United Kingdom, a receiver of them in England can be tried in any place in which he has or has had the goods (1896, c. 52, s. 1 (1)). See also INDICTMENT, vol. vi. p. 371.

Offences committed in the Admiralty jurisdiction are tried wherever the offender is apprehended or in custody (1861, c. 96, s. 115; 1894, c. 60, ss. 684–687).

*Indictment.*—The Larceny Act, 1861, contains the following special rules as to indictments for larceny:—

(a) Three counts for distinct acts of stealing from the same person may be joined in the same indictment, if not more than six months elapsed between the first and the last (1861, c. 96, s. 5).

(b) A count for receiving may be added for each count of stealing (1861, c. 96, s. 92).

(c) Receivers at different times of property stolen at one time may be included in the same indictment (c. 96, s. 93).

(d) Indictments for larceny by bailees, tenants, or lodgers may be in the form used for simple larceny (1861, c. 96, ss. 3, 74).

In the case of larceny by persons in the public service or police, the property is laid in Her Majesty; and in the case of larceny of postal packets, in the Postmaster-General (1861, c. 96, s. 70). On larceny by

bailles, tenants, or lodgers, the property is laid in the general owner or person making the bailment or letting to hire (1861, c. 96, s. 74). The ownership of the stolen goods need not be stated in the case of theft—

(a) Of records or judicial or official documents (1861, c. 96, s. 30);

(b) Of property fixed in squares, streets, or public places or burial grounds (c. 96, s. 31);

(c) Of testamentary documents (c. 96, s. 29).

In proceedings for stealing documents of title to realty, it is enough to aver that the document contains evidence of the title of the person or one of the persons having an interest in the realty to which it relates, and to mention the realty or part thereof (c. 96, s. 28).

In proceedings for stealing oysters from fisheries, it is sufficient to describe the bed, laying, or fishery from which the theft took place, without specifying the parish, township, or vill (1861, c. 96, s. 26).

Search warrants may be granted and executed for stolen goods at common law and under the Larceny Act, 1861, and may be granted and executed on SUNDAY (11 & 12 Vict. c. 42, s. 4; 1861, c. 96, s. 103; 1871, c. 112, s. 16; and see *Jones v. German*, [1897] 1 Q. B. 374).

*Trial*.—The procedure for summary conviction of thieves is dealt with under SUMMARY PROCEEDINGS.

As to the procedure on trial for offences after a previous conviction, see PREVIOUS CONVICTION.

Where a theft with aggravating circumstances is charged, it is, as a general rule, open to the jury to negative the circumstances, and convict of simple theft where the evidence proves common law larceny (see *R. v. Gooch*, 1838, 8 Car. & P. 293).

Where theft by a clerk or servant is charged, and the evidence shows embezzlement, or *vice versa*, the jury may convict of the offence proved (1861, c. 96, s. 72; and see FALSE PRETENCES).

Where several persons are included in an indictment for stealing and receiving, the jury may convict all or any of the accused according to the evidence of theft or receipt of part of the goods (1861, c. 96, s. 93).

On an indictment for robbery the jury may convict of assault with intent to rob (1861, c. 96, ss. 40, 41, 43; *R. v. Mitchell*, 1852, 2 Den. Cr. C. 468).

*Punishment*.—Besides the specific punishments already mentioned, every offence amounting to felony may be punished by imprisonment with or without hard labour for not over two years (54 & 55 Vict. c. 69, s. 1). And offences under the Act of 1861, if misdemeanours, may also be dealt with by fine, and (or) requiring sureties for good behaviour and to keep the peace, and if felonies by requiring sureties to keep the peace (1861, c. 96, s. 117). Male offenders under sixteen may be whipped for certain of the offences, and all males concerned in highway robbery with violence may be whipped. See WHIPPING.

2. *Civil Remedies*.—Every theft involves a trespass; *i.e.* while as a crime it involves a criminal motive or guilty mind, described as the *animus furandi*, it must also include some act which, apart from proof of this motive, gives a cause of action for trespass to goods; and at common law where possession of goods is obtained without trespass, subsequent misappropriation or misuse is not theft. In the same way receipt by a third person of stolen goods not being trespass, the receiver could not be criminally prosecuted at common law, even in the case of receipt with knowledge that the goods were stolen, unless he had done something

which made him accessory after the fact to the felony; and the civil remedy was in trover or detinue, and not in trespass.

The original remedy of a person whose goods were stolen was by a proceeding like, but not derived from, the *actio furti* under Roman law. It was superseded by the appeal of larceny. In time the appellor was allowed to omit the words of felony in his appeal, and to make it in substance a civil proceeding, directed against persons alleged to have the goods without theft.

So far as civil remedies were concerned, this procedure was superseded by the actions of trespass *de bonis asportatis*, and of trover and conversion or detinue. The first of these actions originally lay only against persons concerned in the taking; while the action of trover lay against persons who had possessed and exercised ownership over the goods. The history of this development is fully traced in Pollock and Maitland, *Hist. Eng. Law*, vol. ii. pp. 158–175 (and see 3 Steph. *Hist. Cr. Law*, 133). While forms of action have now ceased, the owner of stolen goods can sue any person in whose hands they are for their delivery, or for damages for interfering with his rights of ownership. He has an alternative procedure by prosecuting or aiding in prosecuting the thief to conviction, on which the property in the goods reverts in him (1861, c. 96, s. 100; 1893, c. 71, s. 24), and by obtaining a restitution order from the Court of trial. To an action brought before conviction, the dilatory plea that the felony had not been prosecuted or convicted was at one time effectual; but this defence is now in discredit and disuse.

Of course where transferees of stolen property take with knowledge of the theft, they are punishable as receivers.

A person from whom a thing is wrongfully taken may retake it by force if at the date of taking he had both property and immediate right of possession (*Blades v. Biggs*, 1865, 11 H. L. 621). The title of the original owner can be defeated only by sale in MARKET OVERT, or in the case of negotiable instruments by transfer to a holder in due course. In the event of a conviction for larceny, the rule as to market overt only protects intermediate holders, and the actual possessor of the goods is deprived of all title against the original owner except under the Statute of Limitations.

[*Authorities*.—Pollock and Maitland, *Hist. Eng. Law*; 3 Steph. *Hist. Cr. Law*; Hawk., P. C.; East, P. C.; Arch. *Cr. Pl.*, 21st ed.; Steph. *Dig. Cr. Law*, 5th ed., 246–270, 286–296, 425; Mayne, *Ind. Cr. Law*, 1896; Russell on *Crimes*, 6th ed.]

**Larding Money**.—A small yearly rent which was paid under this name by the tenants of the manor of Bradford in Wiltshire, either for the privilege of feeding their hogs with the mast of the lord's woods, or as a commutation for some customary service of carrying salt or meat to the lord's larder (Blount, *Tenures of Land*, ed. by Hazlitt).

**Last Day of Term**.—In the old practice certain motions, e.g. a motion for an attachment where the rule was a rule *nisi* only, could not be made on the last day of term (Archbold, *Common Law Practice*, 2nd ed., 615). It was also the rule, prior to the Judicature Acts, that on the last day of term the usual order in which motions were made was reversed; instead of the senior counsel present being entitled, as on other days, to move first, the junior barrister was entitled to precedence both on the first

and second rounds of motions (see note on "Precedence of Motion" in 2 Dowl. N. S. 929). The division of the legal year into terms was abolished by the Judicature Act, 1873, s. 26.

**Last Heir**—He to whom land comes by escheat for want of lawful heirs, that is, the Crown or the lord. See ESCHEAT; HEIR.

**Last-mentioned.**—See *Ashton v. Brevitt*, 1845, 14 Mee. & W. 106.

**Last past.**—In a deed, a day "now last past" means last preceding the day of the delivery, not of the date (*Elphinstone, Interpretation of Deeds*, 125, citing *Steele v. Mart*, 1825, 4 Barn. & Cress. 272; 28 R. R. 256).

**Last Place of Abode.**—By sec. 4 of the Bastardy Laws Amendment Act, 1872, justices may, notwithstanding the absence of the defendant to a bastardy summons, make an order upon him on proof that the summons was duly served upon him personally or left at his "last place of abode" six days at least before the hearing. A considerable number of cases have been decided on these words "last place of abode," the most recent of which are *R. v. Farmer*, [1892] 1 Q. B. 637; and *R. v. Webb*, 1896, 65 L. J. M. C. 98. In the former case at the hearing of the application for an affiliation order it appeared that the summons was left at the house where the defendant had been residing, whereupon the justices heard the evidence and adjudged the defendant to be the putative father of the child. The defendant subsequently brought up the justices' order by a writ of *certiorari*, and he showed that at the date of the service of the summons he had a place of abode in America, whereupon the Court quashed the order, holding that the place of abode in America was his "last place of abode" within the meaning of the section. "I take it," said Lord Esher, M. R., in that case, "that if a man goes to a new place of abode in England, his last place of abode is that to which he goes, and in which he is abiding. Does it make any difference that the place of abode is abroad, where the man is not merely wandering about, but has got a fixed place of abode? I think not. I do not see anything to justify the introduction into the section of the words 'in England.'" But the justices have jurisdiction to make an order against a defendant, notwithstanding that he is out of the jurisdiction, on proof that the summons was left at his last place of abode in England, unless it can be shown that at the time the summons was served he had taken up a new place of abode elsewhere (*R. v. Webb, supra*). (See the whole of the cases on this section collected in Lushington, *Law of Affiliation and Bastardy*, pp. 23-28.)

**Latent Ambiguity.**—See AMBIGUITY.

**Lathe.**—A territorial division peculiar to the county of Kent. Each of the six lathes into which that county has been divided since Anglo-Saxon times comprises several hundreds (see HUNDRED); these exercised the same

judicial powers as the hundreds in other shires. A lathe is a "division of a county" within sec. 64 of the Local Government Act, 1888 (see s. 100).

**Latitat.**—This was a form of writ by which defendants in personal actions were originally summoned to answer in the King's Bench (*Termes de la Ley*, 1708 ed., p. 411). That Court, having no jurisdiction over purely civil causes, contrived to obtain a control in personal actions by issuing a writ directed to the sheriff of Middlesex, and called a Bill of Middlesex, falsely charging the defendant with a trespass which was a cause of action, for which he might be arrested by the king's marshal, and having thus brought the defendant within the jurisdiction of the Court, he might be proceeded against therein for any civil cause of action (see **FICTIONS, LEGAL**; 3 Blackstone, p. 285). If the defendant lived in some other county than the county of Middlesex, the sheriff returned *non est inventus* to the Bill, and thereupon the writ of *latitat* (so called from the wording of the writ itself) was issued, which, after reciting the Bill of Middlesex and the return of the sheriff, and that it was attested to the Court that the defendant "lurks and runs about" ("*latitat et discurrit*") such other county, commanded the sheriff of such other county to take him and to safely keep him so that he might have his body in Court on the day of the return of the writ (see 3 Blackstone, p. 286; and for a form of the Bill of Middlesex and of the writ of *latitat*, see 3 Blackstone, Appendix III. s. 3).

Although the writ of *latitat* was, as above stated, originally preceded by the actual issue of the Bill of Middlesex and a return of *non est inventus*, it eventually became usual in practice to sue it out upon only a supposed and not an actual Bill and return, so that in actions in the King's Bench where a defendant lived in a county other than Middlesex it acquired the place of the first process (3 Blackstone, p. 286). The writ of *latitat* was finally abolished by the Uniformity of Process Act (2 Will. IV. c. 39). See further Jacob's *Law Dictionary*, 1797 ed., "*Latitat*."

**Laundries.**—See **FACTORIES AND WORKSHOPS**, vol. v. at p. 303.

**Law.**—As to questions of fact and law, see **FACT**; **JURY**.

**Lawful Authority.**—Sec. 6, subsec. 5, of the Lunacy Act, 1890, imposes upon every judicial authority and all persons admitted to be present at the consideration of any petition for a reception order, or otherwise having official cognisance of the fact that a petition in lunacy has been presented (except the alleged lunatic, and any person appointed by him to be present), the obligation of keeping secret all matters and documents coming to their knowledge by reason thereof, except when they are required to divulge the same by "lawful authority." The corresponding words in the Lunacy Act, 1845 (8 & 9 Vict. c. 100), were "legal authority," which, it was held in *Hill v. Philp*, 1852, 7 Ex. Rep. 232, applied to an order for inspection of documents. An order for interrogatories or for production of documents would also appear to come within the words "lawful authority" (see Wood Renton, *Lunacy*, p. 98).



**Lawful Cause.**—The “lawful cause” for which a priest can, under the Statute 1 Edw. VI. c. 1, s. 8, deny the communion to any person, is that such person is “an open and notorious evil liver,” the term “evil liver” being limited to moral conduct as distinguished from belief (*Jenkins v. Cook*, 1876, 45 L. J. P. C. 1).

Sec. 1, subsec. 3, of the Coroners Act, 1892, empowers deputy-coroners to act instead of coroners during the illness or absence of the latter “from any lawful or reasonable cause,” or where the coroner is disqualified from acting. Whether a coroner’s absence is “from any lawful or reasonable cause” or not is a question for the judge; a necessary vacation is a “lawful and reasonable cause” (*R. v. Johnson*, 1873, L. R. 2 C. C. R. 15).

**Lawful Day.**—See BUSINESS DAY; DAY; TIME.

**Lawful Game.**—See GAMES.

**Lawful Heirs.**—A devise to A. and his “lawful heirs” creates a fee and not an estate tail. The addition of “lawful” in no degree affects the word “heirs,” for the qualification of being “lawful” is implied in the word “heirs” (*Mathews v. Gardiner*, 1853, 17 Beav. 254). Cp. LAWFULLY BEGOTTEN. Where there is a gift of personalty to tenants for life, with remainder to their “lawful heir or heirs,” the word “heir” must be read in its ordinary legal sense, *i.e.* heir-at-law, and not next-of-kin, unless the context precludes this interpretation (*Smith v. Butcher*, 1878, 48 L. J. Ch. 136).

**Lawful Issue.**—In the case of a gift to a person and his “lawful issue,” a child *en ventre sa mère* at the period of distribution is treated as being in existence for the purpose of sharing in the fund, but a child to be capable of taking under this rule must be one who was legitimately begotten before the period of distribution (*In re Corliss*, 1875, 1 Ch. D. 460).

**Lawfully Begotten.**—A devise to A. and his “heirs lawfully begotten” confers an estate tail (per Sir John Romilly, M. R., in *Mathews v. Gardiner*, 1853, 17 Beav. 254, 257). Cp. LAWFUL HEIRS.

**Lawfully Demanded.**—In proceedings at common law on a condition of re-entry for non-payment of rent, the rent must (unless otherwise provided in the lease) have been lawfully demanded by the landlord or his duly authorised agent, that is, the precise rent must have been demanded on the precise day when it was due and payable to save the forfeiture, and at a convenient time on that day before sunset; further (unless a particular place was appointed where the rent should be payable), the demand must have been made upon the land and at the most notorious place of it, *e.g.* if there is a dwelling-house upon the land, the demand must have been made at the front door (1 Wms. *Saund.*, 6th ed., 286 *b. n.* 16).

Where in an agreement of tenancy there was a clause providing that if the tenant should make default in payment of the rent, within twenty-one days after the same should become due, “being demanded,” it should be

lawful for the landlord, without giving any notice to quit, and without any other warrant, authority, or proceeding, to re-enter, it was held that, to entitle the landlord to re-enter, a demand (but without the formalities of a common law demand) of payment was necessary after the rent was in arrear for twenty-one days, and that a demand within the twenty-one days was insufficient (*Phillips v. Bridge*, 1873, L. R. 9 C. P. 48). Where the rent is in arrear for a half-year, and the landlord takes proceedings under sec. 210 of the Common Law Procedure Act, 1852 (the provisions of which are similar to those contained in 4 Geo. II. c. 28, s. 2), it is not necessary that there should have been a previous demand, service of the writ being substituted for the demand (*Doe d. Lawrence v. Shawcross*, 1825, 3 Barn. & Cress. 752; 27 R. R. 466), and this is so although in the proviso for re-entry on non-payment of the rent the words "being lawfully demanded" are inserted (*Doe d. Scholefield v. Alexander*, 1814, 2 M. & S. 525; 15 R. R. 338; *Doe d. Shrewsbury v. Wilson*, 1822, 5 Barn. & Ald. 363, 384; 24 R. R. 423); it may, however, be otherwise if there is an express covenant that the landlord shall not re-enter without demand (*Doe d. Shrewsbury v. Wilson*, *supra*). "Legally demanded," see *Thorpe v. Hart*, 1886, 30 Sol. J. 469.

**Lawful Trade.**—Where by a marine policy a ship was insured against loss "in any lawful trade," and among the risks to be borne by the insurers was barratry of the master, it was held that the underwriters were liable for a loss which happened by the master barratrously engaging in smuggling, for the stipulation respecting the employment of the ship in a "lawful trade" meant the trade in which the ship was sent by the owners (*Havelock v. Hancill*, 1789, 3 T. R. 277, referred to by Cotton, L.J., in *Cory v. Burr*, 1882, 9 Q. B. D. at p. 471).

**Law List.**—A list of barristers, special pleaders, conveyancers, and solicitors published annually by the authority of the Commissioners of Inland Revenue. By the Solicitors Act, 1860, s. 22, it is made *prima facie* evidence that the persons whose names appear therein as solicitors or conveyancers hold certificates for the current year; and on the other hand the absence of a person's name from the Law List is *prima facie* evidence that he is not qualified to practise under a certificate for the current year.

**Law Martial.**—See MILITARY LAW.

**Law Merchant.**—See LEX MERCATORIA.

**Law Officers.**—The law officers of the Crown are the Attorney-General (*q.v.*) and the Solicitor-General (*q.v.*); formerly the Queen's Advocate (see ADVOCATE, QUEEN'S) was also included, but since 1872 that office has remained vacant. Sometimes the term has been loosely applied to the legal advisers of the various Government departments.

The law officers represent the Crown in the Courts; and when personally engaged in Crown cases they are entitled as of right to a reply where no witnesses are called for the defence (Resolution of Judges of December 1884, 5 State Trials, N. S. 3 n). See REPLY, RIGHT OF.

**Law Reporting.**—Chronicles and recitals in early charters give us occasional accounts of lawsuits and decisions even before the Norman Conquest (see the Appendix to *Essays in Anglo-Saxon Law*, 1876, and Bigelow, *Placita Anglo-Normanica*, 1879). Bracton had a large collection of cases made from the original records to be used as material and authority for his treatise on the laws of England (see *Bracton's Note-Book*, ed. F. W. Maitland, 1887). But law reports, in the sense of accounts of judicial decisions taken at the time and preserved expressly for professional use, do not make their appearance till near the end of the thirteenth century. From that time to the sixteenth century we have a series of reports called Year-Books, which give select decisions of the King's Courts, including, in the reign of Edward I., many cases before the justices in eyre. At first these reports were naturally in French, as being the language of the court and of polite society. Unfortunately the use of French, or something supposed to be French, was continued as a convention after it had ceased to be a living language in the courts or elsewhere in England, and the result was that the "law-French" of the seventeenth century became a corrupt and absurd jargon. The Year-Books of Edward I., and some hitherto unpublished ones of Edward III., have been well printed only in our time, under the care of the late Mr. Horwood and Mr. Pike, in the Record Office series of historical documents (*Chronicles and Memorials of the Middle Ages*); those of later reigns, with apparently capricious omissions, were more or less ill printed in the sixteenth century, and badly reprinted with additions, it would seem without any learned supervision at all, under the Restoration. This edition of 1678-79 is the only one now in use, and is not in any way such as we ought to have. In the case of the Year-Books, as in Bracton's, the Elizabethan publishers displayed a faculty almost amounting to perverted genius for producing the worst possible text with plenty of good material at hand. A new edition collated with the best extant MSS. is badly wanted, but the bulk and cost of such an undertaking have hitherto deterred even those learned and professional bodies who might have been active in the matter. The Selden Society is understood to be about to make a beginning with the Year-Books of Edward II., of which the printed text is exceedingly corrupt, but this can be only by way of example.

The Year-Books, in the later medieval period at anyrate, were written by official reporters paid by the Crown, but such critical examination as modern lawyers and scholars have made is not much to the credit of their accuracy. They came to an end in the reign of Henry VIII., no one seems to know why; the common law courts were probably at their weakest at that time by reason of the practical despotism exercised by the Crown, with or without statutory authority; but the rest is conjecture. An attempt, made under Bacon's advice, to revive official reporting in the reign of James I. was a complete failure. Towards the end of the sixteenth century Plowden, Dyer (or rather the editor of his notes), and Coke started the practice of publishing unofficial reports. None of these were current reports in our sense, and many of the earlier books of reports were published long after the death of the learned persons from whose notes they were, or purported to be, collected. The cases in which they were really prepared for publication by the reporter himself are quite a small minority.

Between Coke's time and Blackstone's law reporting was in a precarious condition. The reports published by various booksellers, without any kind of system, were still commonly posthumous, and seldom properly authenti-

cated, not to say edited. Some of the inferior ones were in such bad repute that judges would not hear them cited. Sir James Alan Park related that when at the Bar he was reprimanded by Lord Kenyon for citing Keble (*Adams v. Gibney*, 1830, 6 Bing. at p. 664; 31 R. R. at p. 521: this in addition to Wallace's references). The use of "law-French" was still the rule. Modern reporting may be said to begin with Sir James Burrow's Reports (1765). From that time we have continuous reports in the Court of King's Bench; and in the other Courts, except the Exchequer, which then hardly counted as a superior Court, from about twenty years later. Thenceforward for a century reporting was carried on by private enterprise in each Court separately; one reporter, or associated set of reporters, was, however, understood to be specially authorised by the judges, and to have an exclusive, or at least prior, claim to the judgments as settled and revised by them. These "authorised" reports were generally accurate, but the system was costly and dilatory. A partial remedy was provided by the legal newspapers issuing cheaper and earlier reports of their own, which soon acquired an independent standing; but these, though often quite as good in substance as the "authorised" reports, and occasionally better in particular cases, ultimately increased the burden, for most men in considerable practice found that they had to get the "authorised" reports for at least their own branch of work, and one of the serial reports as well.

In 1863 the Bar appointed a committee to consider the whole matter, and the result was the establishment of the Council of Law Reporting, under whose direction the Law Reports have been published since 1865, superseding the former "authorised" reports, and practically absorbing their then existing staff and goodwill, though not inheriting their claim to a semi-official character. This may be due to the fact that a few of the old "authorised" reporters held out against the Law Reports, and for a short time continued to publish their own reports separately. Several independent series of reports, of which the oldest are the *Law Journal* reports, are still carried on. The model of the Law Reports has been followed, with local variations, in Ireland, in the great British colonies, and in the High Courts of British India. In Scotland reporting seems to have been under better control from the first. See LAW REPORTS.

In the United States, where things began towards the end of the eighteenth century much on the same lines as those of the contemporary English reports, "there has been a steady tendency towards official reporting; and to-day the reporters of the Supreme Court of the United States and of most, perhaps all, of the State Courts of last resort are public officials, duly elected or appointed" (Wambaugh, *The Study of Cases*, 1894, s. 109). The number of independent jurisdictions and reports creates great difficulties for the practitioner; and in order to cope with these, private enterprise produces a whole body of reprinted arrangements and selections of reports, digests, and other apparatus of reference, to which there is nothing analogous in England. See AMERICAN LAW.

[*Authorities.*—Wallace on the *Reporters*, 4th ed., by F. F. Heard, 1882, a classical work for the early history and bibliography of the subject; Kent's *Commentaries*, Lect. xxi.; the Master of the Rolls (then Lord Justice Lindley) on the "History of the Law Reports," in *Law Quarterly Review*, i. 137; the chapter on "Law Reports" in Pollock, *A First Book of Jurisprudence*, 1896, p. 274. Lists of the reports and the abbreviations by which they are usually cited may be found at the head of vol. i. of the present work, in the law publishers' catalogues, and in digests and other books of reference. See also article LAW REPORTS.]

**Law Reports.**—ENGLISH; IRISH; SCOTCH.—See tables prefixed to vol. i.

**COLONIAL.**—Most of the autonomous colonies have a regular system of reporting the decisions of their Supreme Courts, corresponding to that adopted in England, but in certain cases adapted or modified from the methods of the United States.

The annexed table is an attempt to make a list of the reports, to which, and to the decisions of the Privy Council as the common Appellate Court for all British possessions outside the United Kingdom, reference must be made for the "jurisprudence" of the British Empire.

#### AFRICAN POSSESSIONS.

##### CAPE OF GOOD HOPE.

Name of Reports.	Vols.	Citation.	Period.
Menzies . . . . .	3	Menz.	1828-1849
Searle . . . . .	5	S.	1850-1867
Watermeyer . . . . .	1	Wat.	1857
Roscoe . . . . .	1	Rosc.	1861-1867
Buchanan, J., Supreme Court Cases . . . . .	2	Buch. (& year)	1868-1870
Roscoe . . . . .	2, 3	Rosc.	1871-1878
Buchanan, E. J., Supreme Court Cases . . . . .	7	Buch. (& year)	1873-1879
Foord . . . . .	1	Foord	1880
Buchanan, Court of Appeals . . . . .	2		1880-1886
Eastern Districts Court (Buchanan and others) . . . . .	10	E. D. C.	1880-1896
Juta . . . . .	9	Juta	1880-1892
Cape of Good Hope Reports, Supreme Court (this is a continuation of Juta) . . . . .	4	S. C. R.	1892-1896
Cape Times Law Reports . . . . .	6	Sheil	1891-1896

##### GRIQUALAND.

High Court Reports, Laurence, Colson, and Burton . . . . .	7 (and Index, 1 vol.)	H. C. R.	1882-1895
--	-----------------------	----------	-----------

There are Digests by Searle, 2 vols., of the Cases from 1850 to 1887, and by Searle and Jones, 1 vol., to the end of 1893.

##### NATAL.

This Colony is said to have reports of decisions in the Supreme Court, but they are not accessible in England.

##### MAURITIUS.

Mauritius Decisions (edited by Piston) . . . . .	15		1861-1875
--	----	--	-----------

There are no regular reports for any other African possessions.

#### AMERICAN POSSESSIONS.

##### DOMINION OF CANADA.

Canada Supreme Court Reports— Editors, Duval, 1-24; Masters, 25 . . . . .	26 (current)	Can. S. C.	1876-1896
Cartwright, Cases on the British North American Act . . . . .	4		1882-1890
Exchequer Court of Canada Reports . . . . .	3	Ex. C. R.	1875-1894

##### BRITISH COLUMBIA.

British Columbia Reports . . . . .	(current)	B. C.	1884—
------------------------------------	-----------	-------	-------

##### MANITOBA.

Manitoba, Q. B. . . . .	1		1875-1883
Manitoba, L. R. . . . .	(current)	Man. L. R.	1883-1896

##### NEW BRUNSWICK.

Chipman . . . . .	1	Chip. N. B. (1 N. B.)	1825-1827
Berton . . . . .	1	Bert. N. B. (2 N. B.)	1835-1839

Name of Reports.	Vols.	Citation.	Period.
Kerr . . . . .	3	Kerr N. B. (3-5 N. B.)	1839-1848
Allen . . . . .	6	Allen N. B. (6-11 N. B.)	1848-1868
Hannay . . . . .	2	Han. N. B. (12, 13 N. B.)	1867-1871
Pugsley . . . . .	3	Pugs. N. B. (14-16 N. B.)	1872-1876
Pugsley and Burbidge . . . . .	4	Pugs. & Burb. N. B. (17-20 N. B.)	1877-1881
New Brunswick Reports . . . . .		21- N. B.	1882-1896
Stockton, Admiralty Reports, containing a Digest of all Canadian Vice-Admiralty Cases . . . . .	1		1864-1891
Stevens, Digest . . . . .	2		1825-1886

## NOVA SCOTIA.

*Supreme Court.*

Law Reports, Thomson . . . . .	1	1 Thom. N. Sc. (1 N. Sc.)	1834-1852
James . . . . .	1	James N. Sc. (2 N. Sc.)	1852-1855
Thomson . . . . .	1	2 Thom. N. Sc. (3 N. Sc.)	1856-1859
Cochran . . . . .	1	Coch. N. Sc. (4 N. Sc.)	1859
Oldright . . . . .	2	Old. N. Sc. (5, 6 N. Sc.)	1860-1867
Nova Scotia Decisions . . . . .	3	N. Sc. Dec. (7-9 N. Sc.)	1866-1875
Russell and Chesley . . . . .	3	R. & C. N. Sc. (10-12 N. Sc.)	1875-1879
Russell and Geldert . . . . .	16	R. & G. N. Sc. (13- N. Sc.)	1879-1896

These Reports are now cited as 1- N. Sc.

There is one volume of Nova Scotia Equity Reports by Russell, 1873-1878, cited as R. & C. N. Sc. Eq., and a Digest by Congdon from 1834-1889.

*Admiralty.*

Stewart, Vice-Admiralty . . . . .	1	Stew. N. Sc.	1803-1813
Young, Admiralty Decisions . . . . .	1	Young N. Sc.	1865-1890

## ONTARIO AND UPPER CANADA.

*Appellate Courts.*

Error and Appeal Reports (Grant) . . . . .	3	U. C. (E. & A.)	1846-1866
" " " (Tupper) . . . . .	1-6	1-6 Ont. App.	1876-1881
Ontario Appeal Reports . . . . .	(current)	7- Ont. App. or A. R.	1876-

*Court of Chancery.*

Grant . . . . .	29	U. C. Ch.	1849-1882
-----------------	----	-----------	-----------

*Court of King's (or Queen's) Bench.*

Taylor . . . . .	1	Taylor U. C.	1823-1827
Draper . . . . .	1	Draper U. C.	1829-1831
King's Bench, Old Series . . . . .	6	U. C. K. B. O. S.	1831-1844
Queen's Bench . . . . .	46	U. C. Q. B.	1844-1882

*Court of Common Pleas.*

Common Pleas . . . . .	32	U. C. C. P.	1850-1882
------------------------	----	-------------	-----------

*High Court of Justice.*

Ontario Reports . . . . .	27	Ont. (or O. R.)	1882-1896
Practice Reports . . . . .	16	Ont. Pr. (or P. R.)	1882-1895

There are also two earlier series of Practice Reports.

Chamber Reports . . . . .	2	U. C. Chamb. Rep.	1846-1852
Practice Reports . . . . .	9	U. C. Pract. Rep.	1850-1882

There are several series of Law Journals containing reports of cases, Upper Canada, L. J. 1855-1864 ; Upper Canada Law Journal, N.S., 1865-1894 ; and the Canadian Law Times from 1881.

There are also the following Digests :—

Robinson and Joseph . . . . .	2		1823-1879
Smith and Joseph . . . . .	1		1880-1890
Smith, Brown, and Cassels . . . . .	1		1891-1895

## PRINCE EDWARD ISLAND.

Name of Reports.	Vols.	Citation.	Period.
Haviland . . . . .	1	Peters P. E. I.	1850-1872
Haszard and Warburton . . . . .	2		1850-1882

## QUEBEC AND LOWER CANADA.

Pyke . . . . .	1	Pyke L. C.	1810
Stuart (K. B.) . . . . .	1	Stuart L. C. K. B.	1810-1835
„ (Vice-Admiralty) . . . . .	2	L. C. V. A.	1836-1856
Lower Canada Reports . . . . .	17	L. C. R.	1859-1874
Dorion Queen's Bench Reports . . . . .	4		1850-1867
Quebec Law Reports . . . . .	17	Q. L. R.	1880-1886
„ „ „ Queen's Bench . (current)			1874-1891
„ „ „ Superior Court. (current)			1892-
Cook, Quebec Vice-Admiralty . . . . .	1		1892-
Lower Canada Jurist . . . . .	35	L. C. J.	1873-1884
Revue Legale . . . . .	22	R. L.	1856-1891
Revised Reports . . . . .	9		1869-1894
			1726-1861

*Digests.*

Robertson, Lower Canada . . . . .	1		1727-1863
Stephens, Quebec . . . . .	4		1726-1889

## BERMUDA.

No Law Reports.

## NEWFOUNDLAND.

Select Cases . . . . .	1	Sel. Cas. Newf.	1817-1828
------------------------	---	-----------------	-----------

## WEST INDIES AND SOUTH AMERICA.

There are no regular series of Law Reports in British Guiana, British Honduras, or any of the British West India Islands. There are a few single volumes of reports for Jamaica, and reports of particular cases in other Colonies; but except in these cases the only regularly reported judgments are those of the Privy Council (see Tarring, *Law of Colonies*, 2nd ed., 1893; Wheeler, *Privy Council Law (Appeals)*, 1876-1891).

## AUSTRALASIAN POSSESSIONS.

## FIJI.

No Law Reports.

## NEW SOUTH WALES.

*Reports.*

Reserved and Equity Judgments . . . . .	2	Res. Judg. N. S. W.	1845
New South Wales Reports . . . . .	14	N. S. W. Rep.	1862-1876
Knox . . . . .	1	Knox N. S. W.	1877
Knox and Fitzhardinge . . . . .	2	K. & F. N. S. W.	1878-1879
Law Reports . . . . .	(current)	N. S. W. L. R.	1880-1896

*Digests.*

Watkins and O'Connor . . . . .	1		1840-1881
Cockshott and Lamb . . . . .	1		1892-1896
General Digest . . . . .	1		1890-1896

## NEW ZEALAND.

Macassey . . . . .	1	Mac. N. Z.	1861-1872
Fenton . . . . .	1	Fent. N. Z.	1866-1869
Court of Appeal Reports . . . . .	3	Ct. App. N. Z.	1876-1877
New Zealand Jurist O. S. . . . .	2		1873-1875
New Zealand Jurist N. S. . . . .	4		1875-1879
Olliver, Bell, and Fitzgerald . . . . .	1	O. B. & F.	1878-1881
New Zealand Law Reports, Court of Appeal . . . . .		N. Z. L. B. C. A.	1881-1887

# LAW REPORTS

329

Name of Reports.	Vols.	Citation.	Period.
New Zealand Law Reports, Supreme Court	5	N. Z. L. R. S. C.	1881-1887
New Zealand Law Reports, Supreme Court and Court of Appeal	(current)	N. Z. L. R.	1888-
New Zealand Digest, Richmond	1		1861-1892

## QUEENSLAND.

Queensland Law Reports	3 parts		1876-1878
Queensland Law Journal	(current)		1881-

## SOUTH AUSTRALIA.

South Australian Law Reports .	26	S. A. L. R.	1867-1894
--------------------------------	----	-------------	-----------

## TASMANIA.

There are no Tasmanian Law Reports.

## VICTORIA.

A'Beckett's Reserved Judgments	3	A'Beck.	1846-1848
Victorian Law Times	2	Vict. L. T.	1856-1857
Wyatt and Webb	2	W. & W.	1861-1863
Wyatt, Webb, and A'Beckett	6	W. W. & A'B.	1863-1869
Australian Jurist	5	Austr. Jur.	1869-1874
Victorian Reports	3	Vict. Rep.	1870-1872
Victorian Law Reports	(current)	Vict. L. R.	1876-1896
Australian Law Times	(current)		1879-

There is a Digest by Kerford and Box of the Cases from 1846 to 1871, and a Victorian Digest, 2 vols., from 1861-1890.

## WESTERN AUSTRALIA.

There are no Law Reports accessible in England.

## ASIATIC POSSESSIONS.

### CEYLON

Mutukisna	1		1801-1860
Marshall	1		1833-1836
Austin	1		1833-1859
Nell	1		1845-1855
Murray	1		1846-1847
Beling and Vander Straaten	1	B. & V.	1846-1862
Lorenz	2		1856-1859
Creasy	1		1859-1870
Crowther	1		1863
Beling	1		1863-1868
Beven and Mills	1		1864-1867
Vander Straaten	1	Vand.	1869-1871
Grenier	1		1873
Supreme Court Circular	9	S. C. C.	1878-1891
Ceylon Law Reports	(current)		1890-

### HONG-KONG.

There are no regular Law Reports of the Courts of Hong-Kong, or of the Consular Courts of China, Japan, and Corea.

### STRAITS SETTLEMENTS.

Kyshe's Reports	4		1808-1890
-----------------	---	--	-----------

### MEDITERRANEAN POSSESSIONS.

There are no regular Law Reports for Gibraltar or Malta.

### CYPRUS.

Cyprus Law Reports	3		1883-1895
--------------------	---	--	-----------

INDIAN.—*Bengal*.—Morton (Supreme Court), 1774-1841; Fulton, 1842-44; Sudder Dewanny Adawlut, 1845-60; Boulnois, 1856; Marshall, 1862;



Hyde, 1865; Weekly Reporter, 1864-76; Bengal Reports, 1868-75, and supp. vol.; I. L. R., Calcutta series from 1875.

*Bombay*.—Borradaile (Sudder Court), 1800-24; Perry's Cases, 1853; Morris (Sudder Court), 1856; Bombay H. C., 1870-75; I. L. R., Bombay series from 1876.

*Madras*.—Sudder Udalut, 1849; Madras H. C., 1862-75; I. L. R., Madras series from 1876.

*Allahabad*.—Sudder Dewanny Adawlut, 1843; I. L. R., Allahabad series from 1876.

*Privy Council*.—Knapp, 1829-36; Moore, *P. C.*, 1836-62, and new series, 1862-72; Moore, *Indian Appeals*, 1836-72; L. R. Ind. App. 1872. The I. L. R. contain the decisions on appeal from Bengal, Bombay, etc.

**Lay Days.**—See DEMURRAGE.

**Lay Fee.**—See INVESTITURE.

**Lay Impropiator.**—To understand the expression Lay Impropiator it is necessary to distinguish between appropriation and impropiation. Originally, it is probable that the words were used in the same sense. Appropriations were an abuse of the early period of the Middle Ages. They are termed in the canon law "*annexiones, donationes, uniones*," and the term "appropriation," which was borrowed from the form of such grant "*in proprios usus*," was peculiarly or principally confined to England.

There were originally two sorts of appropriation. The first was when the interests in a benefice, both temporal and spiritual, were annexed to some religious house *pleno jure sive utroque jure tam in spiritualibus quam in temporalibus*, and the other was when temporal interests, *e.g.* the tithes or patronage, only of the benefice were annexed to such house.

Appropriations were originally made for the benefit of the Monastic Orders, and the result of making them was that the parishes so appropriated were often not provided with proper parochial ministrations. To remedy this abuse the Constitution of Othobon was passed, and the Statutes 15 Rich. II. c. 6, and 4 Hen. IV. c. 12 required that such parishes as were known as vicarages (that is, parishes appropriated and served by monastic vicars) should be properly endowed. After the vicarages had been properly endowed, the monks held the livings *in proprietatem* as a sort of lay fee. Subsequently, however, certain monasteries, under the plea of poverty, effected a new kind of appropriation (*uniones ad mensam*), by which they annexed the cure of souls to a monastery, and of such benefices they were perpetual incumbents, and held them *in utroque jure*. The general Council of the Lateran, 1179, forbade appropriations to be made to laymen, and it is said that an appropriation can only be made to a corporate body spiritual.

The effect of the statutes of the dissolution of the monasteries (29 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13) was to put the lay grantee of the monastic lands in the same position as the corporate body which he supplanted. If the holding was of the nature of the *uniones ad mensam*, the grantee was under the obligation only to provide divine service, and might do so by a curate not instituted but only licensed by the bishop; but if the benefice was affected by the statutes above mentioned, it was necessary that a proper vicar should be appointed, and the law always presumes that

a benefice is not impropriated *pleno et utroque jure*. In either case the lay grantee of a benefice formerly appropriate is properly described as an impropriator, but in the latter case he is an ordinary impropriator; in the former, an extraordinary impropriator holding *utroque jure*, for the existing distinction is that when the benefice is in the hands of a religious corporation it is an appropriation, but if in the hands of a layman, an impropriation. At common law it was considered necessary that for the purposes of a valid appropriation the patron of the living should obtain the licence of the King in Chancery and the consent of the Ordinary.

The terms "impropriate" and "appropriate" are sometimes used indiscriminately, as in the Acts 1 Eliz. c. 19, 29 Car. II. c. 8.

[*Authorities*.—See, in particular, the statement of the law in *Duke of Portland v. Bingham*, 1792, 1 *Consist.* pp. 162–167, by Lord Stowell; Ayliffe, *Par.*; Phillimore, *Eccl. Law*, 2nd ed., vol. i. pp. 217–222. As to a lay impropriator, further, see articles RECTOR; VICARAGE; PERPETUAL CURATE. As to his liability to repair the chancel, see article CHANCEL, and Addenda in vol. xii.]

**Lay Rector.**—See RECTOR.

**Lea.**—"Lea or ley signifieth pasture" (*Co. Litt.* 4 b).

**Lead Away.**—See TAKE AND CARRY AWAY.

**Leading Question.**—See WITNESS.

**Lead Mines.**—See MINES AND MINERALS.

**League.**—See ALLIANCE; HANSEATIC LAWS OF THE SEA.

**Leakage and Breakage.**—The words "leakage and breakage excepted," or "not accountable for leakage and breakage," in a bill of lading or charter-party, while they will protect the shipowner from liability for damage so caused to the goods put in his charge, will not do so if the damage has been caused by the negligence of the master or crew in handling or stowing the goods (*Phillips v. Clark*, 1857, 2 C. B. N. S. 156; *Czech v. General Steam Navigation Co.*, 1867, L. R. 3 C. P. 14). The effect of the exception, however, is to put the burden on the goods-owner of proving that the damage was actually caused by the negligence of the shipowner or his agents, and he cannot recover unless he does so; and in *Czech's* case above, where goods were injured by oil, but there was no oil in the cargo, but two donkey-engines stood close to the goods, and oil was used to lubricate them, there being no other evidence, the shipowner was held not liable. As already seen under CARGO, the shipowner only undertakes to exercise reasonable care and skill in stowing the cargo; and he has thus been held not liable, under a charter-party containing this exception, for damage due to oil being stowed in the same hold with rags and wool, and the rags and wool heating, and

the oil casks becoming dry and leaky, and the oil consequently escaping (*The Helene*, 1866, L. R. 1 P. C. 231). The exception does not cover damage to goods done by leakage from other goods, unless it is so expressed; and thus where oil barrels and palm baskets were shipped together under such an exception, and the oil barrels leaked, and the palm baskets were damaged by oil, the shipowner was held not liable (*Thrift v. Youle*, 1877, 2 C. P. D. 432; *The Nepoter*, 1869, L. R. 2 Ad. & Ec. 375). The words cover leakage and breakage, whether extraordinary or ordinary in extent (*The Helene*, above). Under a charter-party excepting damage from "perils of the seas and other accidents of navigation, even when occasioned by negligence of master," the shipowner has been held exempt from liability for damage to cargo owing to neglect of the master to stop a leak (*The Cressington*, [1891] Prob. 152). For loss by leakage and breakage in marine insurance, see MARINE INSURANCE.

[*Authority*.—Carver, *Carriage by Sea*.]

**Leap Year.**—The natural or solar year consists of 365 days, 5 hours, 48', 45", 30", but as that was inconvenient for subdivision Julius Cæsar, when he superseded the lunar year, made the Roman year to consist of 365 days, adding an extra day every fourth year after the 24th February, which was the sixth day before the calends of March, that day being reckoned twice, the first day being *bissexus prior* and the second *bissexus posterior* or bissextile day (*bis*, twice, and *sextilis*, sixth). Hence the bissextile or leap year. The Julian year held good in England in early times, and a statute of 21 Hen. III. enacted that the intercalary day and that next before it should be reckoned as one day. Owing to the discrepancy, however, between the year so calculated and the true solar year, in course of time the seasons got altered, and in 1581 Pope Gregory XIII. made a new calendar, *inter alia*, expunging ten days from the year 1582. This calendar, however, the non-Papal States of Europe did not at once adopt, and though it was already in force before that time in Scotland, it was not till 1751 that 24 Geo. II. c. 23 was passed, enacting that the legal year should begin on 1st January instead of 25th March, and rectifying the increased error by omitting eleven nominal days from September of 1752, besides enacting that 1800, 1900, 2100, 2200, 2300, or any other hundred years, except only every fourth hundredth year should not be taken as leap years, so vastly diminishing the unavoidable error.

**Lease and Release.**—The common use of the conveyance by lease and release originated in the devices of lawyers (originally, it is said, of Serjeant Moore) to escape the effect of the Statute of Inrolments (27 Hen. VIII. c. 16, 1536), requiring enrolment, as therein mentioned, of every passage of an estate of inheritance or freehold from one person to another, or the creation of any use therein, by reason only of a bargain and sale (*q.v.*). The object of the statute was to ensure the publicity of conveyances; and through the conveyance by lease and release, taking effect under the contemporaneous Statute of Uses, this object was defeated. At common law, a lessee till he enters has only an *interesse termini* (*q.v.*); but before the Statute of Uses (*q.v.*) (27 Hen. VIII. c. 10, 1536) a bargain and sale of lands created in the bargainee a use similar to the modern "trust," which the Court of Chancery would enforce. The statute, which converted uses into legal estates, thus gave the bargainee for a term of years

possession without entry; and as the Statute of Inrolments did not extend to chattel interests, such bargain and sale did not require enrolment.

To complete the conveyance recourse was then had to a release by the bargainer of all his remaining interest in the land to the bargainee, who thus obtained the fee-simple. Before 1536 such a release could be, and often was, made—for instances have been found as far back as Henry IV., and it was a good performance of a condition to make a feoffment—but it had then to follow on a common law lease, requiring entry by the lessee, and the general use of the conveyance dates only from 1536. The old common law lease was still used by corporations, they being incapable of being seised to a use. The bargain and sale for a nominal term, usually a year, was made for a nominal pecuniary sum, such as 5s. or 10s., and the release was made by a contemporaneous deed, usually dated the following day, though executed on the same day. The simplicity and privacy of this method of conveyance, as compared, either with a deed enrolled under the Statute of Inrolments, or with a feoffment (*q.v.*), at once recommended it, and it remained the usual mode of conveyance for three hundred years. After the Statute of Frauds (29 Car. II. c. 3, 1676) the bargain and sale for a year had to be in writing, and signed by the lessor or his agent, as no rent was reserved; and it was in fact usually made by deed, though this was not necessary till the Real Property Amendment Act of 1845, which rendered this mode of conveyance itself unnecessary (see also LEASE). A release never had a tortious operation, and a conveyance by lease and release was therefore said to be an “innocent” conveyance, simply passing what might lawfully be conveyed (see FEOFFMENT).

In 1841 was passed the Act 4 & 5 Vict. c. 21, providing that every deed of release of a freehold estate, expressed to be made in pursuance of the Act, should be as effectual as if the releasing party had also executed in due form a lease for a year for giving effect to such release, though no such lease for a year should in fact have been executed. The conveyance was thus shortened and simplified by being made to consist of one deed instead of two; and finally, in 1845, was passed the Real Property Amendment Act, 8 & 9 Vict. c. 106, which (repealing an Act of the previous year (7 & 8 Vict. c. 76), providing that freehold land might be conveyed by deed without livery of seisin or enrolment or a prior lease) continued the simplicity gained by the Act of 1841, and at the same time effected a revolution in the theory of conveyancing. Hitherto corporeal hereditaments had been considered to lie in livery, the method of grant by deed being applicable only to incorporeal hereditaments; but the Act provided that thenceforward all corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold, be deemed to lie in grant as well as in livery (see REAL PROPERTY; HEREDITAMENTS). After 1845 the conveyance by lease and release, or by release alone, practically ceased to be used, though the Act of 1841 was not repealed till 1874. In a lease and release the release operated at common law, and therefore no estate *in futuro* could be created by this means, though the release was good as a covenant to stand seised (for which a relationship of blood or marriage was necessary) (see *Roe v. Tranmarr*, 1757, Willes, 682). But uses could be declared on the release, and took effect under the Statute of Uses. Specimens of a lease and release will be found in Appendix A to Williams on *Real Property*.

[*Authorities*.—Challis on *Real Property*, 2nd ed.; Williams, 18th ed.; Goodeve, *Modern Law of Real Property*, 4th ed.]

**Lease; Leasehold.**—It is probably due to the fact that the earliest leases were agricultural leases of very short duration that the English law has always looked upon leaseholds as personal property, and upon the leaseholder as having no more than a chattel interest in the land, descendible to his executor and not to his heir. The ejected leaseholder's remedy for dispossession was but the personal remedy of claiming damages against his landlord on the covenant or warranty for quiet enjoyment; against the land itself he had not any of the rights that are incident to a freeholder. When in later times landlords granted longer leases and leaseholds consequently became of greater importance, though rights to regain possession of the land were given to the tenant, the nature of his property therein remained none the less unchanged, and however long the term for which the premises may be held, the property therein is still personal property, and devolves on the owner's death according to rules of descent (*i.e.* the Statute of Distributions) absolutely distinct from those that govern the devolution of real estate.

The interest of the leaseholder in his lands was but a chattel interest; these chattel interests in land, seeing that they "savoured of the realty," were called "*chattels real*," in contradistinction to moveable goods, which were known as "*personal chattels*" (see hereon CHATTELS; PERSONAL PROPERTY).

Although, however, the law looks upon leaseholds as personal property, it is now well settled that it will not lose sight of the fact that they are immoveables, a distinction of very great importance in determining as regards the conflict of laws of different countries whether on the death of the owner they are to be governed by the *lex loci rei sitæ* (the law of the country wherein they are situate) or the *lex domicilii* (the law of the country of the owner's domicile). It was at first contended that the rule *mobilia sequuntur personam* applied to leaseholds; such a contention involving the interpretation of *mobilia* and personal property as one and the same class. In *Forbes v. Stevens*, 1870, L. R. 10 Eq. 178; *Freke v. Lord Carberry*, 16 Eq. 461; and *In the goods of Gentili I. R.*, 9 Eq. 541, this distinction was clearly laid down, and the principle enunciated that the *lex loci* determined the devolution of all *immoveables* alike, as well of leaseholds as of real estate. In *Duncan v. Lawson*, 1889, 41 Ch. D., the question for decision being whether the next-of-kin of a testator according to English or according to Scotch law were entitled to the undisposed of leaseholds in England belonging to a domiciled Scotchman, it was argued that leaseholds undisposed of went to the executor, and that he must deal with the beneficial interest in them as with other personal estate, treating them as personal property by the *lex loci*, and dealing therefore with both in the same way. But it was held that the case was not different from an absolute intestacy, that the *lex loci* governed the devolution of *mobilia*, and the leaseholds devolved upon the persons entitled under the English Statute of Distributions.

Leaseholds may be disposed of by will; as to assignment thereof *inter vivos* the Statute of Frauds provided that such assignment (except in the case of leases for not more than three years, and at a rent of not less than two-thirds of the full value of the land) should be in writing, and the Real Property Act, 1845, required a deed in every case where the Statute of Frauds required writing (29 Car. II. c. 3, s. 3; 8 & 9 Vict. c. 106, s. 3).

To the conception of leaseholds as personal property is due also the principle that if a man, possessed both of freeholds and leaseholds, devised "all his lands and tenements," the freeholds alone passed; the principle was, however, not applied in the case of his having no freeholds at all, and his leaseholds allowed to pass under such a general devise for the

reason that his will would otherwise wholly fail to have effect. This manifest violation of the testator's intention was abolished by the provisions of the Wills Act, which provided that a devise of the land of the testator or a devise of the land of the testator in any place or in the occupation of any person mentioned in his will or otherwise, described in a general manner, and any other general devise *which would describe a leasehold estate* if the testator had no freehold estate which could be described by it, should be construed to include the leasehold estates of the testator (or any of them to which the description extends) as well as freehold estates, unless a contrary intention appear by the will (Wills Act, 1837, 7 Will. IV. and 1 Vict. c. 26).

But by "real estate," "freeholds," and like words, not being such "as would describe a leasehold estate," leaseholds do not pass unless there are no freeholds at all, or within the description, or in default of some other clear evidence of intention.

The incidents of leaseholds are dealt with under YEARS, ESTATE FOR; the law as to contracts for sale and purchase thereof, under VENDOR AND PURCHASER; the rights of lessor and lessee, under LANDLORD AND TENANT; and further details on the general law affecting the subject will be found under CHATTELS; ESTATES. As to building leases, see vol. ii. 281; next art.; SETTLED LAND.

**Leases, Ecclesiastical.**—Ecclesiastical persons who hold land *jure ecclesiæ* are in a position analogous to that of a tenant for life of settled land, but are not within the Settled Land Acts. The fee-simple in such a case is said to be in abeyance, but the ecclesiastical life tenant is limited, like other tenants for life, as to waste (*Ross v. Adcock*, 1868, L. R. 3 C. P. 655; *Sowerby v. Fryer*, 1869, L. R. 8 Eq. 417; *Ecc. Comm. v. Wodehouse*, [1895] 1 Ch. 552).

As to leases, the leasing power at common law extended only to the life of the parson who was lessor, or to his tenure of the benefice, by virtue of which he held the land leased.

The power has been modified by a long series of enactments. These still unrepealed fall into two distinct categories:—

1. Beginning in 1536 and going down to 1836 (6 & 7 Will. IV. cc. 24, 60).
2. The Ecclesiastical Leases Acts, beginning in 1842 and going down to 1868.

The older law is complicated, as to dealings before the Fines and Recoveries Act, by the practice of using leases and releases as a means of alienation, which tends to be confused with the grant of ordinary leases at a full rent (Phillimore, *Ecc. Law*, 2nd ed., 1281).

An Act of 1536 (28 Hen. VIII. c. 11, ss. 5, 6) validated for six years leases avoided by resignation of the ecclesiastical lessor, and for one year leases avoided by his death. These provisions were repealed in 1863. But a lease of parsonage house and the glebe attached was expressly excepted (s. 7) from the provision for validation.

In 1540 (32 Hen. VIII. c. 28) power was given to persons, other than parsons or vicars holding lands *jure ecclesiæ*, to make a lease binding on their successors (*Doe d. Richardson v. Thomas*, 1839, 9 Ad. & E. 556). This Act is not repealed (see 19 & 20 Vict. c. 120, s. 35), and is in the nature of an enabling statute. By subsequent legislation, fetters were put on the alienation, charging, or leasing of church lands.

In 1558 (1 Eliz. c. 19, s. 4) bishops were disabled from parting with their lands otherwise than by lease for not over twenty-one years, or three lives, at the accustomed rent.

An Act of 1571 (13 Eliz. c. 20) is still in force forbidding charges on a benefice *with cure* of souls, with a pension or profit to be yielded and taken therefrom, other than rents on leases made after 1817 (57 Geo. III. c. 99; *Hawkins v. Gathercole*, 1857, 6 De G., M. & G. 1). The Act has passed through stages of repeal and revival, which are traced in Robbins on *Mortgages*, p. 438.

The Act does not apply to rectories impropriate, or tithes in lay hands, or ecclesiastical emoluments without cure (*McBean v. Deane*, 1885, 30 Ch. D. 520), but avoids all charges on benefices in ecclesiastical hands for ecclesiastical purposes. It extends not merely to mortgages on the profits, but also pew rents (*Ex parte Arrowsmith*, 1878, 8 Ch. D. 96) and leases created (*Walthev v. Crafts*, 1851, 6 Ex. Rep. 1), and to any direct or indirect contrivance in the nature of a lease to secure a charge (see Robbins on *Mortgages*, 438-441, and GLEBE).

A second Act of that year (13 Eliz. c. 10), besides dealing with fraudulent conveyances by clergy and claims for dilapidations, renders absolutely void all leases except for twenty-one years or three lives at the accustomed rent, by the master and fellows of a college, the dean and chapter of a cathedral or collegiate church, the master or warden of a hospital, and by parsons, vicars, and others having any spiritual or ecclesiastical living, of any houses, lands, tithes, tenements, or other hereditaments belonging to them *jure ecclesiæ* (*Moore v. Clench*, 1875, 1 Ch. D. 447; *Magdalen Hospital v. Knotts*, 1879, 4 App. Cas. 324).

In 1572 (14 Eliz. c. 11) houses in cities or towns corporate are excepted from the restrictions of the Act of 1571 (s. 1), but may not be let for more than forty years, nor except on repairing lease at the accustomed rent (s. 7).

In 1575 (18 Eliz. c. 11) it was forbidden to grant a lease when there was an existing lease of the same lands having three years to run or not surrendered within three years of the making of the new lease.

By the Ecclesiastical Leases Act, 1765 (5 Geo. III. c. 17), the leasing powers were extended so as to include leases of tithes and other incorporeal hereditaments (including advowsons), and a remedy given by action for recovery of rents reserved and in arrear on leases for lives under any of the Acts (s. 3). Prior to that Act the remedy was by distress (1 Co. *Inst.* 44 b). By the Ecclesiastical Leases Act, 1800 (39 & 40 Geo. III. c. 41), separate demises at an annual rent were permitted of lands, etc., anciently let under a single demise. Allotments made to incumbents under Inclosure Acts in right of glebe may be leased for a term not exceeding twenty-one years, to commence within twelve months after the execution of the award, at the best and most improved rent obtainable, without fine, premium, or foregift, and payable quarterly (41 Geo. III. c. 109, s. 38). The lease must have covenants for re-entry on non-payment of rent; and the tenant must not be made punishable for waste. If the lease is avoided before the end of the term a new lease may be granted (1 & 2 Geo. IV. c. 23, s. 4).

Two Acts of 1836 (6 & 7 Will. IV. cc. 20, 64) restrict the renewal of ecclesiastical leases. Leases for lives may not be renewed till one of the lives has dropped, and then only for the life of the survivor and such new lives as make up the number of lives in the original grant. A forty years' lease may not be renewed till fourteen years have run, a thirty years' till ten, and a twenty-one years' till seven have expired; and a lease for lives may not be given on renewal of a lease for years.

The result of the Pre-Victorian Acts is thus stated by Crnise, *Dig.* "Real

Property" (ed., 1835), vol. iv. p. 62; and Phillimore, *Ecc. Law*, 2nd ed., 1281.

Leases to bind successors must, if granted by an ecclesiastical corporation sole, be confirmed by the proper persons; if granted by a corporate aggregate, do not need confirmation, there being in such a case perpetual succession; and in case of a corporation aggregate the majority of the members can bind the minority (33 Hen. VIII. c. 27).

But to be valid against successors—

(1) The lease must be by indenture, and made to begin from its making.

(2) Existing leases must be determined or surrendered absolutely within three years of the making of the new lease, or in the case of bishops' leases, one year, unless confirmed by dean and chapter, in which case there is no such limit (*Wilson v. Carter*, 1744, 2 Stra. 1201). Covenants for renewal in a lease made it void (*Crane v. Taylor*, 1616, Hob. 269).

(3) Until 1765 the lease could be of corporeal hereditaments only. The hereditaments leased must have been let before (*Doc d. Tennyson v. Yarborough (Lord)*, 1822, 1 Bing. 24), but several leases may be granted of land formerly comprised in a single demise (39 & 40 Geo. III. c. 41).

(4) The lease must be for not more than twenty-one years in the case of land, and forty years in the case of houses in towns, nor more than three lives; but a lease for lives cannot be granted on renewal of a lease for years.

(5) An annual rent must be reserved, the accustomed rent or more; but a fine on renewals seems to have been permitted, except under 41 Geo. III. c. 109, s. 38.

(6) The lease must not be made without impeachment of waste, and of a house in a town must be a repairing lease (*Dean, etc., of Worcester's case*, 1606, 6 Rep. 37).

(7) The leases of parsons and vicars also require confirmation by the ordinary and patron.

*The Modern System.*—The Pluralities Act, 1838 (1 & 2 Vict. c. 106), contains provisions restricting the right to let a parsonage house, enabling the bishop to avoid any agreement if the house is required for the parson's residence.

The Ecclesiastical Leases Act, 1842 (5 & 6 Vict. c. 27), empowers incumbents of ecclesiastical benefices, with the consent of bishop and patron, to grant farming leases of lands, to which the provisions of the prior Acts did not extend, i.e. lands which had not been usually let (*Jenkins v. Green*, 1 De G., F. & J. 454). The parsonage house and ten acres of glebe situate most conveniently for occupation must not be leased (s. 2). The lease must be for not over fourteen years, to take effect in possession, and reserve the best and most improved yearly rent payable quarterly, and contain a series of covenants, as subletting, repairs, insurance, cultivation, and improvements. The term may extend to twenty years where the lessee covenants to effect at his own expense drainage or improvements out of the ordinary course. Before the lease is made the lands must be surveyed by a competent surveyor appointed by bishop and patron. A surrender of a lease granted under the Act cannot be effected without privity of bishop and patron, who must execute the lease, and whose execution is conclusive as to its validity (s. 4).

By another Act of the same year (5 & 6 Vict. c. 108) power was given to ecclesiastical corporations aggregate or sole to grant, with or without fines or premiums (21 & 22 Vict. c. 57, s. 1), building leases for a term not exceeding ninety-nine years, and to lease running water, water-leaves, and way-leaves, and to grant mining leases. The parsonage house must not be



leased. The provisions and conditions, which are lengthy and elaborate, involve payment over to the Ecclesiastical Commissioners of improved annual values over a certain amount (ss. 12, 13).

The Act differs from those before it in allowing leases within it to be granted without surrender of existing leases of the same subjects, and permitting confirmation of certain voidable leases and release of breaches of covenant by lessees. It legalises leases which were void under the earlier Acts (*Ecclesiastical Commissioners v. Wodehouse*, [1895] 1 Ch. 552); and if the lease is not legal under the Act, persons can be restrained at the suit of the Commissioners from acting under it.

The lessors are not liable to successors in the benefice for dilapidations on lands let under an authorised lease (5 & 6 Vict. c. 108, s. 19; 34 & 35 Vict. c. 43, ss. 58, 59).

The Ecclesiastical Leases Act, 1858 (21 & 22 Vict. c. 57), authorises the taking of premiums on leases under 5 & 6 Vict. c. 108, which are paid over to the Ecclesiastical Commissioners (s. 2). It contains also powers as to sale, exchange, and partition, and an incidental power to accept surrenders. Lands acquired under the Act must be let at a rack-rent for a term not exceeding fourteen years (see 5 & 6 Vict. c. 27), unless let under 5 & 6 Vict. c. 108. Counterparts of leases under these two Acts must be lodged with the Ecclesiastical Commissioners. A similar provision is found in the Episcopal and Capitular Estates Act, 1851 (14 & 15 Vict. c. 184, s. 9).

Acts of 1861 and 1862 (24 & 25 Vict. c. 105; 25 & 26 Vict. c. 52) put an end to a customary power of granting leases of manorial church lands for lives or long terms at nominal rents, in consideration of fines, premiums, or foregifts; and the lands as to which such powers had been exercised were brought under the Act last described both as to the legal terms of the leases and the consideration for their grant.

The instructions issued by the ECCLESIASTICAL COMMISSIONERS under these Acts are stated in vol. iv. p. 385.

*Leases by Bishops and Chapters.*—Besides the Acts already specified, there are other enactments specifically dealing with leases by bishops and chapters.

Under 4 & 5 Vict. c. 39 (s. 26), lands may be let by bishops or chapters for building or improvement on such conditions and for such term as the Commissioners approve, and the proceeds applied for augmentation of benefices. The general control and management of the lands of bishops and chapters is now subject to the Episcopal and Capitular Estates Acts, 1851 (14 & 15 Vict. c. 104). Under that Act lands acquired by bishops or chapters can be leased for fourteen years, or, subject to the assent of the Commissioners, for a longer period (s. 9); and under the Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), provision was made for vesting all episcopal lands in the Commissioners, with a power to assign or secure lands as endowment of a See. Lands so assigned can ordinarily be let only for a term not exceeding twenty-one years under conditions the same as in 5 & 6 Vict. c. 27 (*ante*), unless the Commissioners allow a lease on other terms for mining, building, or other purposes. And a similar provision was made in 1868 (31 & 32 Vict. c. 114, s. 9) as to leases of lands vested in the deans and chapters of Bristol, Canterbury, Carlisle, Chester, Chichester, Exeter, Gloucester, Llandaff, Peterborough, Rochester, St. Asaph, St. David's, Salisbury, Wells, Winchester, Windsor, Worcester, and York (see 31 & 32 Vict. c. 19), and to lands attached to ecclesiastical offices in connection with a cathedral or collegiate church (31 & 32 Vict. c. 114, s. 13). Lands subject to ecclesias-

tical leases are within the Agricultural Holdings Act, 1883 (45 & 46 Vict. c. 61). But secs. 38, 39 limit the powers of the ecclesiastical lessor, and provide for the raising of compensation money.

[*Authorities*.—*Bac. Abr.* tit. "Lease"; Cruise, *Digest of Law of Real Property*, iv. 62; Phillimore, *Ecc. Law*, 2nd ed., 1281; *Chit. Stat.*, 6th ed., vol. vi., tit. "Landlord and Tenant," p. 109.]

**Leave and Licence.**—A plea to an action of tort that the act complained of was done with the consent of the plaintiff is always a good defence, provided the act itself is not a crime (*Edwick v. Hawkes*, 1881, 18 Ch. D. 199), upon the principle *volenti non fit injuria*. The most common use of the plea is where the real defence to an action for trespass to land is a LICENCE from the person in possession, and a common reply to it is that the licence had been revoked before the trespass complained of. Any act done with the knowledge of a person who would have a right to object to it may be presumed to be done by his licence, if he is shown to have known of it without objecting (*Roscoe, N. P.*, 15th ed., p. 34; *Doc v. Wilson*, 1809, 11 East, 56). See ACQUIESCENCE and LICENCE.

**Leave to Appeal.**—In certain cases no appeal lies from one tribunal to a higher except by leave, which, in some instances, may be given either by the Court from whose decision it is desired to appeal, or by the appellate tribunal; sometimes, on the other hand, leave can only be given by the first of these Courts (see per Lord Esher, M. R., in *Ex parte Stevenson*, [1892] 1 Q. B. 609, where he said (p. 611): "Wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given").

The following are the most important cases in which leave to appeal is necessary:—

*To the House of Lords.*—In bankruptcy matters (Bankruptcy Act, 1883, s. 104, subs. 2 (c)). See APPEALS, vol. i. p. 269.

*To the Privy Council.*—See APPEALS, vol. i. p. 273, and PRIVY COUNCIL.

*To the Court of Appeal.*—Interlocutory orders or judgments made or given by a judge, except (1) where the liberty of the subject or the custody of infants is concerned; (2) orders granting or refusing an injunction or the appointment of a receiver; (3) decisions determining the claim of any creditor or the liability of any contributory, or the liability of a director or other officer under the Companies Acts, in respect of misfeasance or otherwise; (4) decrees *nisi* in matrimonial causes, and judgments or orders in Admiralty actions determining liability; (5) orders on special cases stated under the Arbitration Act, 1889; and (6) such other cases as may be prescribed by rules of Court (Jud. Act, 1894, s. 1). The leave required may be given either by the judge who decided the matter or by the Court of Appeal (*ibid.*); but if the judge refuses leave, the Court of Appeal will also refuse it, unless a very strong case is made out (*Foster v. Fraser*, 1894, noted 39 Sol. J. 51; and see *Hawkins v. G. W. Rwy. Co.*, 1895, 14 R. 360).

In cases heard by a Divisional Court on appeal from any Court or person, no appeal lies to the Court of Appeal unless leave is given either by the Divisional Court or by the Court of Appeal (Jud. Act, 1894, s. 1, subs. 5; see also Jud. Act, 1873, s. 45, and Bankruptcy Appeals (County Courts) Act, 1884, s. 2). Where leave has been refused by the Divisional

Court, the Court of Appeal, although it has power to grant leave, will not exercise it except in cases where it seems clear that injustice will otherwise be done (*Hawkins v. G. W. Rwy. Co.*, *supra*).

Orders made by the High Court, or a judge thereof, by consent, or as to costs only, which are in the discretion of the Court, are not appealable unless by leave of the Court or judge making the order (Jud. Act, 1873, s. 49). See APPEALS, vol. i. pp. 275 *et seq.*

*From County Courts.*—No appeal lies from the decision of a County Court in actions of contract or tort (other than actions of ejectment, or actions in which the title to any corporeal or incorporeal hereditament shall have come in question), nor in actions of replevin, or for the recovery of tenements, or in interpleader proceedings, if the interest involved in such cases does not exceed £20, unless the judge grants leave to appeal (County Courts Act, 1888, s. 120). Where judgment has been given for damages and an injunction, an appeal will lie against so much of the judgment as granted the injunction, without leave, although the damages are for less than £20 (*Brune v. James*, [1898] 1 Q. B. 417). See COUNTY COURTS, vol. iii. p. 538.

**Leave to Bid.**—See SALE BY THE COURT.

**Leave to Defend.**—See SUMMARY JUDGMENT.

**Leaving.**—Although the word “leaving” in the phrase “without leaving children,” *prima facie* points to the period of death, yet it may receive a different interpretation from the context. Thus, if a legacy is given to one for life, and after his death to his children, with a gift over if the tenant for life dies without “leaving” children, the gift over is sometimes construed as meaning in default of objects of the prior gift, or, as it is commonly expressed, “leaving” is construed “having.” “The Court, to prevent the vested interest from being divested, has read the word ‘leaving’ as though it were ‘having’ or ‘having had’—a considerable liberty being thus taken with the actual words, to effectuate what the Court conceives to be the paramount intention . . . of securing portions to the children who live to attain vested interests in them” (per Kay, J., in *In re Hamlet, Cunningham v. Graham*, 1888, 57 L. J. Ch. 1007; *affd.* 58 L. J. Ch. 242). But the addition of such words as “him surviving,” or “at his death,” to “leaving children,” makes it much more difficult to construe “leaving” as “having” or “having had” (*ibid.*). Such a construction will not be adopted when it is clear that in some event or other a vested gift is intended to be divested (*In re Ball, Slattery v. Ball*, 1888, 58 L. J. Ch. 232); nor will it readily be applied where the subject-matter of the gift is an annuity which *ex vi termini* involves the notion of personal enjoyment (*In re Hemingway, James v. Dawson*, 1890, 45 Ch. D. 453). And if a gift is introduced by words importing contingency, as if the gift be “in case A. shall leave any child or children, to the children of A. at twenty-one, but if A. shall die without leaving children,” over, the word “leaving” must be read in its natural sense (*Bythessa v. Bythessa*, 1854, 23 L. J. Ch. 1004; *Young v. Turner*, 1861, 1 B. & S. 550).

Where a testator devised freeholds to his son J. “and the heir male of his body lawfully begotten, and the heirs and assigns of such heir male

for ever," and in case J. should "die without leaving any son" then over, it was held that this gave J. an estate for life, with a contingent remainder in fee to the person, if any, who at J.'s death should answer the description of heir male of his body, with a limitation over if there should be no such person (*Chamberlayne v. Chamberlayne*, 1856, 25 L. J. Q. B. 357). See **DIE WITHOUT CHILDREN**; **DIE WITHOUT ISSUE**; **ISSUE**.

[*Authorities*.—Jarman, *Wills*, 5th ed., vol. ii. pp. 1057, 1638–1641, where the subject is fully discussed; see also Hawkins, *Wills*, p. 217; and Stroud, *Jud. Dict.*]

**Lecturer**.—A spiritual person licensed to officiate either in a parish church or in some chapel. The office of a lecturer can only be founded with the assent of the patron, incumbent, and ordinary, unless it has been established by statute or by immemorial custom. The incumbent may in all cases object to any particular appointment of a lecturer; the lecturer must be licensed by the archbishop or bishop, and must further make and subscribe the declaration of assent, and the declaration against simony, and take the oath of allegiance and supremacy as required by the Clerical Subscription Act, 1865 (see s. 5). A lecturer who has been appointed to lecture or preach only may be required by the bishop of the diocese to perform such other clerical or ministerial duties as assistant curate or otherwise, as the bishop, with the assent of the incumbent, may prescribe; and in case he refuses or neglects to perform such additional duties, he may (subject to an appeal to the archbishop of the province) be suspended or removed from his office (7 & 8 Vict. c. 59, s. 1).

[*Authority*.—Cripps, *Church and Clergy*, 6th ed., pp. 143–154.]

**Lectures**.—See **COPYRIGHT**.

**Leeman's Acts**.—The popular title of (1) 30 & 31 Vict. c. 29, which provides that contracts for the sale or transfer of shares in joint-stock banking companies shall be void unless the numbers by which such shares are distinguished are set forth in the contract (see **BANK SHARES**); and (2) the Borough Funds Act, 1872, which enables municipal corporations and certain other bodies on complying with the provisions of the Act as to notices, etc., to promote or oppose local and personal bills in Parliament, and to take other proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, and to defray the costs of such proceedings out of the rates. See **MUNICIPAL CORPORATIONS**.

**Leet**.—See **COURT BARON** AND **COURT LEET**; **MANOR**.

**Leeward Islands**.—A group of islands in the West Indies, most of which now belong to Great Britain. St. Kitts was the centre and starting-point of the English settlements in that part of the world; they possessed a common legislature as early as the reign of William and Mary, but after 1798 separate local legislatures were formed. By an Act of the imperial Parliament (34 & 35 Vict. c. 107) the islands were constituted a federal colony, under one governor and one Legislative Council. The federal

legislature has concurrent authority with the local legislatures in regard to the subjects specified in the Act; and local enactments are void if repugnant to those of the federal authority. The Supreme Court of the Leeward Islands now consists of the chief justice and two puisne judges; there is an appeal from its decisions to the Queen in Council; for conditions of appeal, see PRIVY COUNCIL. The laws of the islands are English in their origin.

The islands now form five Presidencies, each of which possesses an Executive and a Legislative Council of its own. *Antigua* has a Legislative Council of twenty-four, of whom twelve are elected. *Christopher, Nevis*, and *Anguilla* have been united since 1882. *Dominica*, assigned to Great Britain in 1763, retains some French institutions, and the majority of the inhabitants speak a French patois. The other Presidencies are *Montserrat* and the *Virgin Islands*, or those of them which belong to Great Britain.

[*Authorities.*—The *Colonial Office List*, and statutes enacted by the various legislative bodies mentioned above.]

**Left.**—"A bequest of what shall 'remain' or 'be left' at the decease of the prior legatee . . . is void for uncertainty" (1 Jarman, *Wills*, 5th ed., 333). But where a testator gave the residue of his estate to his wife "for her own absolute use and benefit and disposal," and, without prejudice to the absolute power of disposal so given, gave what should "remain undisposed of" by her to other persons, it was held that the gift over took effect as to such part of the residue of the testator's estate as remained at the death of his widow undisposed of by any act of hers *inter vivos* (*In re Pounder, Williams v. Pounder*, 1886, 56 L. J. Ch. 113).

## Legacy.

### TABLE OF CONTENTS.

I. DEFINITION . . . . .	342	VII. VESTING OF LEGACIES . . . . .	349
II. LEGATEES . . . . .	343	VIII. PAYMENT OF LEGACIES . . . . .	349
III. THE CLASSIFICATION OF LEGACIES . . . . .	344	IX. MISCELLANEOUS . . . . .	351
IV. CONDITIONAL LEGACIES . . . . .	345	<i>Repetition of Legacies</i> . . . . .	351
V. WORDS COMMONLY USED IN GIVING LEGACIES . . . . .	346	<i>Legacies given in succession</i> . . . . .	352
VI. FAILURE OF LEGACIES . . . . .	347	<i>Legacies charged on Land</i> . . . . .	352
		<i>Legatee's right to Accounts</i> . . . . .	352

### I. DEFINITION.

A legacy is a gift in the form of a direction by testamentary instrument that the legal personal representative of the testator shall pay, transfer, or provide some money or thing to the recipient or legatee. Strictly speaking, the term "legacy" is inapplicable to gifts of real estate, though when used by an unlearned testator it may include them.

It is important to observe that the legatee does not derive his legacy immediately from the testator, but through the hands of the executor. Thus a testator cannot by leaving a sealed packet to A. prevent his executors from doing their duty in opening the packet before delivering it to A. (*Pelham v. Newton*, 1754, 2 Lee Eccl. 46).

Gifts made in contemplation of death, though not by testamentary instrument, which in many respects resemble legacies, are dealt with under DONATIO MORTIS CAUSÆ.

## II. LEGATEES.

Any person may now be a legatee. In the following cases the condition of the legatee may influence the legal effect of the bequest.

1. *Creditors*.—If a testator being then indebted to a person makes his will and leaves a legacy to that person, it has been somewhat fantastically held that the intention was to pay the debt with the legacy (*Fowler v. F.*, 1735, 3 P. Wms. 353; *In re Fletcher*, 1888, 38 Ch. D. 373). This doctrine being now looked on with disfavour, the Courts have been astute to discover circumstances which would enable its application to be avoided. Thus any circumstances rendering the legacy less certainly advantageous to the legatee than payment of the debt have been laid hold of to furnish the inference that the testator meant the legacy as an act of bounty and not of mere supererogation. Instances are—a legacy of a smaller amount than the debt (*Gee v. Liddell*, 1866, 35 Beav. 623), or of residue (*Devese v. Pontet*, 1785, 1 Cox, 188), or one given conditionally or contingently (*Tolson v. Collins*, 1799, 4 Ves. 482; 4 R. R. 264), or where the testator has directed payment of his “debts and legacies” (*Chancey’s case*, 1717, 1 P. Wms. 408).

A legacy of smaller amount than the debt is payable in full, and does not go to extinguish the debt *pro tanto*.

The doctrine is inapplicable as regards ordinary creditors when the debt came into existence contemporaneously with or after the will (*Wiggins v. Horlock*, 1888, 39 Ch. D. 142). See SATISFACTION.

2. *Executor*.—A legacy to an executor is *prima facie* conditional on his accepting the office and proving the will, and this presumption is not displaced by the fact that the legacy occurs in a different part of the will to the appointment of executors or that the legacies to different executors are of unequal amounts (*In re Appleton*, 1885, 29 Ch. D. 893). But a reference by the testator to relationship or friendship as a motive for the legacy will entitle the legatee to his legacy without accepting the office (*Bubb v. Yelverton*, 1871, L. R. 13 Eq. 131)\*, nor does the rule apply to a gift of residue (*Griffith v. Pruett*, 1840, 11 Sim. 202).

3. *Infant*.—A legacy to an infant may, if the testator so direct, be paid to the infant at once, in which case the infant’s receipt will be effectual (*In re Danaker*, 1895, W. N. 28), but otherwise the legacy must either be retained until the infant attains twenty-one, paid to the testamentary guardian of the infant (*M’Creight v. M’Creight*, 1850, 13 Ir. L. R. 314; *In re Cresswell*, 1881, 45 L. T. 468), or paid into Court under the Trustee Act, 1893 (56 & 57 Vict. c. 53, s. 42). As to the powers of employing the income or capital of an infant’s legacy for its maintenance, see INFANTS.

4. *Servants*.—A legacy to servants, simply, comprises only servants in the testator’s service at his death, and a servant who has left (even though wrongfully dismissed) will lose the legacy (*Darlow v. Edwards*, 1862, 1 H. & C. 547; *In re Hartley*, 1878, 47 L. J. Ch. 610). But where a legacy was given to “servants who shall have been in my employ for ten years,” a servant who was not in the testator’s service at his death, or at the date of the will, was entitled to share in the legacy (*In re Sharland*, [1896] 1 Ch. 517).

5. *Wife*.—A legacy to a wife in the absence of an express direction to that effect (which, though seldom inserted, would usually be in accordance with the testator’s wishes) has no priority over other legacies, even charitable ones (*In re Scheveder*, [1891] 3 Ch. 44), even though it is directed to be paid immediately. A legacy to a married person may be affected by the provisions of his or her marriage settlement, if that provides for the settlement of after-acquired property (*Scholfeld v. Spooner*, 1884, 26 Ch. D. 94). •

An executor who was unaware of the settlement would not, however, be liable for having paid the legacy to the legatee.

A legacy to an attesting witness, or his or her spouse, is void. See WILL. As to legacies for charitable purposes, see CHARITIES.

Legacies are sometimes given for quasi-charitable or public purposes; for instance, the promotion of yacht-racing (*In re Nottage*, [1895] 2 Ch. 649). Such legacies are perfectly lawful, but will fail unless infringement of the rule against PERPETUITIES has been expressly guarded against.

### III. THE CLASSIFICATION OF LEGACIES.

Legacies are either specific, demonstrative, or general.

A specific legacy is the gift of a particular thing, the property of the testator (*Bothamley v. Sherson*, 1875, L. R. 20 Eq. 304).

A direction to purchase a specified article, such as a picture, and present it to the legatee, is not a specific legacy, for the legatee could elect to take the value instead (*In re Bowes*, [1896] 1 Ch. 507).

To constitute a legacy specific, it must be clear that the testator referred to a particular thing, as distinguished from any one of the same species. Thus a legacy of my £100 stock, or my shares in the X. Company, is specific; while a legacy of "£100 stock," "ten shares," is not *per se* specific, even though the testator had that exact amount (*In re Gray*, 1887, 36 Ch. D. 205).

A specific legacy is liable to ADEPTION, but not to ABATEMENT, until the general legacies have been exhausted. And although, if a testator sells or disposes of an article specifically bequeathed, the legacy fails; yet, however, if he has pledged or charged a chattel which he bequeaths specifically, the legatee does not merely get the right to redeem the chattel, but is entitled to have the charge paid off out of the testator's residuary assets (*Bothamley v. Sherson*, 1875, L. R. 20 Eq. 304), but has no right to contribution from other specific legatees (*In re Butler*, [1894] 3 Ch. 250). The same rule would probably apply where, at the testator's death, the chattel was subject to a lien for repairs, or where, by reason of adverse claims or the like, expenditure was necessary to obtain possession of it. Of course, if the terms used in the will show that the testator meant to give his interest in the chattel, be it what it might, to the legatee, the principle of the above cases no longer applies.

However, liabilities accrued *after* the testator's death in respect of a specifically bequeathed chattel, fall on the legatee (*Hawkins v. Hawkins*, 1880, 13 Ch. D. 470; *Adams v. Ferick*, 1859, 26 Beav. 384). Thus if a testator makes a specific bequest of shares not fully paid up, while calls made before the testator's death must be paid out of his general estate, the legatee must bear future calls himself (*Day v. Day*, 1860, 1 Dr. & S. 261; *Armstrong v. Bennett*, 1855, 20 Beav. 424; *Lindley on Companies*, 5th ed., p. 543).

A gift of residue *may* be specific (*Robertson v. Broadbent*, 1883, 8 App. Cas. 812). The question whether a particular legacy is general or specific is, however, one of construction, the leaning of the Court being to consider legacies as general rather than specific. Thus an enumeration of a number of specific articles as part of a residuary bequest is *prima facie* regarded as intended to insure the inclusion of those articles, and does not create a specific legacy of them (*Fielding v. Preston*, 1857, 1 De G. & J. 438).

A demonstrative legacy is a general legacy with a reference to a particular fund for payment. "It is so far general, and differs so much in effect from one properly specific, that if the fund be called in, or fail, the

legatee will not be deprived of his legacy, but will be permitted to receive it out of the general assets (*In re Tunno*, 1890, 45 Ch. D. 66); yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets" (*Tempest v. Tempest*, 1857, 7 De G., M. & G. at p. 473). Thus a gift of £100, to be paid out of the proceeds of a policy or out of stock, is demonstrative, but a gift of money out of money, or stock out of stock, is specific (*Davies v. Fowler*, 1878, L. R. 16 Eq. 308; *In re Pratt*, [1894] 1 Ch. 491).

Every legacy which is neither specific nor demonstrative is general.

#### IV. CONDITIONAL LEGACIES.

A legacy may be given upon condition that the legatee does, or refrains from doing, some act.

Conditions are either precedent or subsequent; that is, the legatee is to perform the condition either before he gets his legacy, or after. If a condition precedent is impossible, the legatee of course cannot comply with it, and therefore does not get his legacy (*Robinson v. Wheelwright*, 1856, 6 De G., M. & G. 535), unless the performance was rendered impossible by the act of the testator, or unless the impossibility was absolute and obvious (*Guth v. Burton*, 1839, 1 Beav. 478). An illegal or immoral condition precedent is void (*Brown v. Peck*, 1758, 1 Eden, 140).

The impossibility, illegality, or immorality of a condition subsequent simply destroys the condition and leaves the original gift unaffected (*Wilkinson v. Wilkinson*, 1871, L. R. 2 Eq. 604). The commonest conditions imposed by testators relate to—

1. Marriage.—A condition subsequent in general restraint of marriage is void (*Morley v. Rennoldson*, [1895] 1 Ch. 449); but a gift, at any rate to a woman, for her support until marriage, is good.

Conditions in partial restraint of marriage, such as prohibiting marriage without consent, or under a certain reasonable age, or with a person of inferior social position, or of a particular religious belief, are valid; but conditions subsequent of this nature, unless fortified by the property being given otherwise on non-compliance with the condition, are deemed merely "in terrorem,"—intended to make the legatee unhappy if he or she does not fulfil them,—and have no legal effect.

The only common condition precedent relating to marriage is when a legacy is given to a person on his or her marriage with consent.

In this case the condition is satisfied by marriage without consent (*Gray v. Gray*, 1889, 23 L. R. Ir. 399), unless (a) there is a gift over, or (b) the consent is only required for marriage under twenty-one (or some reasonable age) (*Stackpole v. Beaumont*, 1796, 3 Ves. 89; 3 R. R. 52).

2. Conditions of giving up other property or making payments to other persons. The cases in which a condition of this description is implied, from the testator's assuming to dispose of another's property as his own, are dealt with under ELECTION.

3. Conditions, whether precedent or subsequent, against change of religion are valid (*Hodgson v. Holford*, 1879, 11 Ch. D. 959), but *quære* as to the validity of conditions imposing a change of religion.

4. Conditions against disputing the validity of the testator's will, or instituting administration proceedings without reasonable cause, are good (*Adams v. Adams*, [1892] 1 Ch. 369).

If a will is decided by legal proceedings to be invalid, of course any condition contained therein against disputing it fails with it. The condition will only punish unsuccessful attempts to upset the will. Moreover, if



such a condition purports to prohibit "all legal proceedings in relation to the will," or the like, it will be bad, as being too sweeping. Such a condition, in fact, causes the will to commit suicide, for it prohibits obtaining probate (*Rhodes v. Muswell Hill Land Co.*, 1861, 29 Beav. 560).

5. Conditions of forfeiture on bankruptcy or alienation. A condition precedent, making a legacy payable only if the legatee, when the time for payment arrives, is not and has not been a bankrupt or the like, is valid. A condition subsequent, forfeiting property which has been given absolutely to a legatee, either on alienation or bankruptcy, is void, as being inconsistent with the prior absolute gift (*Metcalf v. Metcalf*, [1891] 3 Ch. 1); but such conditions are valid if imposed upon a tenant for life (*Blackman v. Fysh*, [1892] 3 Ch. 209; *In re Sheward*, [1893] 3 Ch. 502).

6. Conditions attempting to restrict the mode of user of property which has been in the first instance given absolutely, are void.

Restrictions on alienation have already been considered.

Another form of restriction is to endeavour to prevent a legatee from touching the capital of his legacy; as, for instance, directing that he is only to have the income until he is forty years old. This is ineffectual (*Saunders v. Vautier*, 1841, Cr. & Ph. 240).

#### V. WORDS WHICH COMMONLY OCCUR IN GIVING LEGACIES.

"Books" are not included in a gift of "household furniture" (*Bridgman v. Dove*, 1744, 3 Atk. 202; *Ouseley v. Anstruther*, 1847, 10 Beav. 463).

"Books" includes manuscripts (*Willis v. Curtois*, 1838, 1 Beav. 189).

"Contents" of a desk or box passed cheques and promissory notes therein (*In re Robson*, [1891] 2 Ch. 559).

"Effects," standing by itself, is capable of the widest meaning, and may comprise the whole real and personal estate of the deceased (*Hall v. Hall*, [1892] 1 Ch. 361); but when the word "effects" follows a mention of furniture, plate, or the like, or is used with reference to locality, its meaning will be narrowed to articles *ejusdem generis* with those mentioned, or articles usually considered as having local position. Thus a bequest of "furniture and effects at the testator's house" did not carry bank notes, bonds, or jewellery (*In re Miller*, 1889, 61 L. T. 365).

*Foreign Money.*—Legacies are to be paid in the currency of the country where the testator resided; and the value of a legacy given in foreign coin by a testator domiciled in the foreign country is to be taken at the standard par of exchange, and not the actual current exchange of the day (*Cockerell v. Barber*, 1810, 16 Ves. 461).

"Furniture" includes pictures, plate, linen, and curiosities of all kinds exhibited as ornaments, but not books, wearing apparel, wines, sporting weapons, scientific instruments, or tenant's fixtures (*Manton v. Tabois*, 1885, 30 Ch. D. 92).

"Goodwill" will not carry the business premises without assistance from the context (*Blake v. Shaw*, 1860, Joh. 732), nor the capital or book debts (*Delany v. Delany*, 1885, 15 L. R. Ir. 55).

"Household effects" has much the same meaning as "furniture," but will include wine (*In re Bourne*, 1888, 58 L. T. 537; and see "effects," *supra*). Household effects would clearly not include horses, carriages, garden utensils, live or dead stock, and probably not the contents of a conservatory.

"Jewellery" would not pass a collection of coins (*Sudbury v. Brown*, 1856, 4 W. R. 736).

*Locality.*—A legacy of "goods" or the like at a particular place will pass everything at the place except stocks, shares, debentures, or mortgages,

or the like, the documents relating to which, though at the place, are merely evidences of property, and not the property itself.

Such a bequest will also include articles which have been temporarily removed for any purpose, such as repair, valuation, or safe custody (*Spencer v. Spencer*, 1856, 21 Beav. at p. 549); but probably not articles ordered to be sent to the place, but not yet delivered (*Lane v. Sewell*, 1874, 43 L. J. Ch. 378; *Field v. Peckett*, 1861, 29 Beav. 573).

"Money" may, with some assistance from the context, comprise the whole residuary personal estate (*In re Cadogan*, 1883, 25 Ch. D. 154), as where the "residue of my money after paying debts" is given.

But the proper meaning of "money," and the term "ready money" is hardly capable of any other, is current coin, bank notes, and ascertained sums in the hands of third persons, such as bankers or agents, on behalf of the testator (*Byrom v. Brandreth*, 1873, L. R. 16 Eq. at p. 479).

Legacies are sometimes given in moneys of account, such as guineas, or in foreign money, as dollars or rupees (where the testator's domicile is English). In this case it is apprehended that the legatee must be paid at the standard par of exchange, and could not either insist on, or be compelled to take, payment in the actual coins.

"Plate" means silver-plate, and does not, or did not in 1863, include plated articles, unless there were no silver articles (*Holden v. Ramsbottom*, 1863, 4 Gif. 205). It is doubtful whether "plate" would include jewellery.

*Selection.*—A person to whom such things as he may select from the testator's library or pictures or plate are bequeathed, may select the whole lot (*Arthur v. McKinnon*, 1879, 11 Ch. D. 385).

"Shares" do not, properly speaking, cover debenture bonds (*In re Bodman*, [1891] 3 Ch. 135), but will include stock (*Morrice v. Aylmer*, 1845, L. R. 7 H. L. 717), and also debentures, if the testator had no shares in the company (*In re Weeding*, [1896] 2 Ch. 364).

The above rules are all subject to the cardinal rule that the whole will is to be looked at, and that an examination of the whole will may show that a testator did not use an expression in its proper meaning, but with some secondary signification.

## VI. FAILURE OF LEGACIES.

A legacy may fail from

- (i.) Invalidity or revocation of the instrument conferring it (WILL).
- (ii.) The uncertainty or vagueness of the terms of the bequest (for instance, a legacy of a "handsome gratuity" is void (*Jubber v. Jubber*, 1839, 9 Sim. 503; *Asten v. Asten*, [1894] 3 Ch. 260)), or uncertainty as to the person designated as legatee (*In re Stephenson*, [1897] 1 Ch. 75).
- (iii.) The insolvency of the testator's estate (ABATEMENT).
- (iv.) (In the case of a specific legacy) the testator having disposed of it in his lifetime (ADEMPTION).
- (v.) By the testator paying the legacy in his lifetime.

This, which is only of importance as regards general legacies, is only applicable as regards legatees to whom the testator stood *in loco parentis*.

Thus if a testator by his will leaves B., a stranger, £100, and subsequently gives B. £100, even during his last illness, this will not deprive B. of his legacy, unless it is proved that the testator so intended, or unless the legacy was expressly given for a particular object, and the sum of money was handed over expressly for the same object (*Pankhurst v. Howell*, 1870, L. R. 6 Ch. 136; *In re Pollock*, 1885, 28 Ch. D. 552; *In re Fletcher*, 1888,

38 Ch. D. 373; *Wetherly v. Dixon*, 1815, 19 Ves. 411; 13 R. R. 228). But if the legacy was given to a child, or to a person to whom the testator had placed himself in *loco parentis* (*Rogers v. Soutten*, 1838, 2 Keen, 598; *Watson v. Watson*, 1864, 33 Beav. 574), then, in order to produce equality among all the children or persons in a similar position, a subsequent (*In re Peacock's Estate*, 1872, L. R. 14 Eq. 236) gift will satisfy the legacy, either absolutely or *pro tanto* (*Leighton v. Leighton*, 1874, L. R. 18 Eq. 458; *In re Lacon*, [1891] 2 Ch. 482; *Meinertzen v. Walters*, 1872, L. R. 7 Ch. 670). Similarly, a gift to a daughter's husband, in contemplation of the marriage, will satisfy a legacy to her (*Durham v. Wharton*, 1835, 3 Cl. & Fin. 146). It is important to notice that the doctrine is only applied to produce equality between children. As between a child and other persons, the child will take both the legacy and the gift (*Meinertzen v. Walters*, 1872, L. R. 7 Ch. 670; see also SATISFACTION).

(vi.) The death of the legatee in the testator's lifetime. The legacy is then said to *lapse*. The testator may of course provide for the event of the legatee so dying, and may then give the legacy to the personal representatives of the legatee, so that it will be distributable as part of the legatee's estate. A gift to A. and his executors will not, however, prevent lapse, nor a gift to A. or his executors (*Aspinall v. Duckworth*, 1866, 35 Beav. 307). This last rule furnishes a singular instance of departure from the two fundamental principles of construing wills. For the words used are not given their primary legal meaning; and the result reached being the same as if the words "or his executors" had been omitted, the rule of giving to every word used by the testator some meaning, if possible, is infringed.

The 33rd section of the Wills Act enacts that a gift to issue of the testator will not lapse if issue of the legatee survive the testator. The Act does not, however, give the legacy to the surviving issue, but renders it applicable as part of their deceased ancestor's estate (*In re Mason's Will*, 1865, 34 Beav. 494); and the section has no application to a gift to issue of the testator as a class, even though, as it turns out, the class consists of a single individual (*In re Harvey*, [1893] 1 Ch. 567).

A gift to a number of named persons as tenants in common, is a gift of so many distinct shares, and if one legatee dies before the testator, the shares of the others are not increased, but the share of the one so dying either falls into the residue or passes as on an intestacy, as the case may be (*Ramsay v. Shelmerdine*, 1865, L. R. 1 Eq. 129; *Sykes v. Sykes*, 1868, L. R. 3 Ch. 301; *In re Palmer*, [1893] 3 Ch. 369).

But if the gift be to a number of named persons as joint tenants, and one die before the testator, the others take the whole (*Morley v. Bird*, 1798, 3 Ves. Jun. 628; 4 R. R. 106).

If the gift be to a class of persons (that is, to a number of persons identified by their alike possessing a particular attribute), whether as joint tenants or tenants in common, then, inasmuch as the persons forming the class are ascertained at the testator's death, the fact that a particular person would, if he had survived the testator, have been a member of the class, is obviously immaterial, and the persons forming the class at the death of the testator take the whole fund (*Dimond v. Bostock*, 1875, L. R. 10 Ch. 358). A named person may be one of a class if he possesses that common attribute which defines the class (*In re Featherstone*, 1882, 22 Ch. D. at p. 121); and a gift to children by name, "and such children as should be thereafter born," is a gift to the class (*In re Jackson*, 1883, 25 Ch. D. 162).

(vii.) A legacy may fail from the non-happening of the event upon which the legacy was given (see *supra*, CONDITIONAL LEGACIES).

## VII. VESTING OF LEGACIES.

In the absence of express direction, a legacy becomes *due* on the death of the testator, though it will not then be *payable*. But where the will fixes some future time for the payment of the legacy, questions will or may arise as to whether the legacy is *vested* so as, on the decease of the legatee before the time of payment arrives, to pass to his representatives, or is *contingent* on the legatee himself being alive at the specified time, or on the happening of some other event. An enormous number of cases have arisen on this point, and only the principal rules can be here referred to.

(i.) If the legacy is given simply, and subsequently it is directed to be "paid" or "transferred" on the legatee attaining twenty-one or the like, only the payment is postponed (*Shrimpton v. Shrimpton*, 1862, 31 Beav. 425).

(ii.) If the gift is to the legatee "if" or "when" he attains twenty-one or in similar terms, the legacy is contingent on his attaining that age (*Harrison v. Graham*, 1801, 6 Ves. 239; 5 R. R. 277).

(iii.) If the payment is postponed merely for the convenience or benefit of the testator's estate, the legacy is vested (*In re Bennett*, 1857, 3 Kay & J. 280).

(iv.) If interest is given to the legatee in the meantime, either directly or by way of maintenance (*In re Hart's Trusts*, 1858, 3 De G. & J. 195), the legacy is vested (*Scotney v. Lomer*, 1886, 31 Ch. D. 380).

(v.) If the language used by the testator admits of any reasonable doubt as to its meaning, the Court leans strongly in favour of holding the legacy vested, rather than contingent, particularly when the question is whether a legacy to a child subject to its parent's life-interest is or is not contingent on the child surviving its parent (*Swallow v. Binns*, 1855, 3 Kay & J. 417; *Wakefield v. Maffet*, 1885, 10 App. Cas. 422). (The above were cases on deeds, but the same rule applies to wills (*In re Knowles*, 1882, 21 Ch. D. 806).) The testator's language must, however, leave room for doubt (*Jeyes v. Savage*, 1875, L. R. 10 Ch. 555). The fact that a man has made a foolish will does not, perhaps unfortunately, authorise the Court to make a better one for him.

## VIII. PAYMENT OF LEGACIES.

Legacies ordinarily become due at the death of the testator, but are not payable for a year; the executors being entitled to that period for getting in the assets and paying the debts; and a testator cannot compel his executors to pay a legacy sooner, even by directing immediate payment.

The executors may, however, do so if they have funds, and have no reason to doubt the solvency of the estate (*Angerstein v. Marton*, 1823, 1 T. & R. at p. 241; 24 R. R. 32; *In re Kay*, [1897] 2 Ch. 518); and an executor who refused without reason to pay an immediate legacy to a wife, especially if it was directed to be paid in priority to other legacies, would certainly act improperly, and would endanger his costs (*In re Kay*, [1897] 2 Ch. 518).

Apart from payment or actual delivery, the legatee's full right to his legacy is acquired when the executor assents thereto.

The assent operates as an admission by the executor that there are assets of the testator sufficient for the payment of the legacy.

Consequently, he thereby renders himself personally responsible for the payment in the event of the testator's assets proving insufficient, unless he can prove either that the admission was made by mistake (*Clark v. Bates*, 1848, 1 De G. & Sm. 203), or that the assets were sufficient at the date of the assent, and that he is not responsible for their subsequent loss (*Horsley*

*v. Challoner*, 1750, 2 Ves. Sen. at p. 85; *In re Bacon*, 1889, 42 Ch. D. 559).

The executor may assent to a part of the residuary bequest being distributed rateably among the residuary legatees without making any admission as to the rest of the estate (*Austin v. Beddoe*, 1893, W. N. 78); but a payment or assent to one residuary legatee (or one tenant in common or joint tenant of a legacy) is an assent to the corresponding shares of the rest (*Dinsdale v. Dudding*, 1842, Y. & C. C. 265).

Payment of, or assent to, one legacy does not, however, in other cases operate as an admission of assets for other legacies of equal priority (*Cadbury v. Smith*, 1869, L. R. 9 Eq. 37).

The assent need not be in writing, or even by express words, but may be inferred from conduct, such as paying interest (*Payne v. Tanner*, 1886, 55 L. J. Ch. 611), or making payments on account (*Payne v. Little*, 1855, 22 Beav. 69).

An assent to a bequest to a tenant for life is an assent to the bequest in remainder also (*Stevenson v. Liverpool*, 1874, L. R. 10 Q. B. 81).

An executor is not bound to pay legacies in cash. He may transfer any part of the testator's estate (Land Transfer Act, 1897, s. 4) to a legatee who is *sui juris* and entitled to payment, at the fair market price of the day (*In re Lepine*, [1892] 1 Ch. 210).

If a legacy is payable *in futuro*, the executor may invest the amount of the legacy in Consols, but not in other trustee securities, unless authorised by the will (*In re Outhwaite*, [1891] 3 Ch. 494; *Stewart v. Sanderson*, 1870, L. R. 10 Eq. 26). An appropriation in payment of a share of residue may be validly made though no corresponding appropriation is made on behalf of the other shares (*In re Richardson*, [1896] 1 Ch. 512); and if an appropriation of particular property has been validly made to answer a legacy, the legatee must stand the chance of gain or loss (*Fraser v. Murdoch*, 1880, 6 App. Cas. 855).

The effect of sec. 4 of the Land Transfer Act, 1897, on the law as to appropriation of legacies payable *in futuro* is obscure, and it is impossible to guess its meaning satisfactorily.

A legatee sometimes desires to renounce or disclaim his legacy, either from the legacy being burdened with onerous conditions, or to confer a benefit on the residuary legatees. Probably a verbal renunciation is sufficient, but the more prudent course is undoubtedly to disclaim by a deed.

As regards interest on legacies—

A specific legacy, when the executor assents to it, carries with it all accretions, such as dividends and bonuses, from the death of the testator (apportioned if necessary, *Pollock v. Pollock*, 1874, L. R. 18 Eq. 329) (*In re Lysaght*, 1897, 67 L. J. Ch. 65; *In re Clements*, [1894] 1 Ch. 665; *Maclaren v. Stainton*, 1861, 3 De G., F. & J. 202).

General legacies carry interest from the date for payment, *i.e.* generally from the expiration of a year from the testator's death.

Legacies payable upon the happening of a future event, as the death of a tenant for life, carry interest from the event (*In re Waters*, 1889, 42 Ch. D. 517; *Lord v. Lord*, 1867, L. R. 2 Ch. 782).

Legacies, however, carry interest from the death of the testator in the following cases:—

(a) When charged on land simply, without any trust for sale (*Spurway v. Glynn*, 1804, 9 Ves. 483; 7 R. R. 279).

(b) If the legacy is in lieu of a debt (*Clark v. Sewell*, 1744, 3 Atk. 99).

(c) Or is given to a child of the testator, or a person to whom the

testator has placed himself *in loco parentis* (*Martin v. Martin*, 1866, L. R. 1 Eq. 369), unless the testator has otherwise provided for the maintenance of the child (*In re Moody*, [1895] 1 Ch. 101).

Under some circumstances interest is chargeable against a legatee, being a child of the testator, who has received his legacy in advance (*Dallmeyer v. Dallmeyer*, [1896] 1 Ch. 372; *In re Lambert*, [1897] 2 Ch. 169). See HITCHCOCK.

The income of a contingent legacy passes as residue pending the contingency (*In re Judkin's Trusts*, 1884, 25 Ch. D. 743), unless the legacy is specific, or an intention to sever the legacy from the estate for all purposes can be discerned (*In re Medlock*, 1886, 54 L. T. 828; *In re Woodin*, [1895] 2 Ch. 309).

The rate of interest is 4 per cent., when payable out of the testator's assets or by a dilatory executor, but against an executor who has been guilty of misconduct in employing the assets for his own purposes, 5 per cent. is charged, and the legatee has the option of taking the profits which the executor may have made (*Vyse v. Foster*, 1872, L. R. 8 Ch. 309).

*Payment on Security to refund.*—If a legacy is defeasible upon a contingency which is highly improbable, as, for instance, upon the re-appearance of a person who has not been heard of for many years, or the birth of a child to a married couple of advanced age, the Court may direct payment to the persons entitled subject to the contingency, upon their giving security to refund the legacy if the contingency happens, or, if the probability of the contingency happening is very small, upon an undertaking to refund, or even without an undertaking (*Daniell, Chan. Practice*, p. 1779). The order of the Court would, under sec. 3 of the Judicial Trustees Act, 1896, completely protect an executor who acted on it, and the same Act would protect an executor who acted "honestly and reasonably" on his own responsibility. In many cases an indemnity or a policy of insurance against the risk would sufficiently protect the executor.

*Retainer.*—If a legatee owes money to the estate, the executor may pay the legacy by setting it off against the debt (*In re Taylor*, [1894] 1 Ch. 671), even though statute-barred (*In re Akerman*, [1891] 3 Ch. 212), and this right is exercisable against an assignee of the legacy (*In re Jones*, [1897] 2 Ch. 190).

*Refunding Legacies.*—If a legatee has been paid, and the estate, whether from the discovery of further debts or the loss of assets, subsequently proves insufficient, he may be compelled to refund his legacy in favour of creditors (*Fordham v. Wallis*, 1852, 10 Hare, 217), or of an executor who has had to pay the creditor out of his own money (*Jervis v. Wolferstan*, 1874, L. R. 18 Eq. 18). Similarly, a residuary legatee may be compelled to refund in favour of general legatees (*Prowse v. Spurgin*, 1868, L. R. 5 Eq. 99). As regards income, it appears that a creditor whose debt carries interest can get the interest as well as the principal, and that he can get at any income of the property which he can find in existence, but he cannot compel the refunding legatee to account for the income received (*Hooper v. Smart*, 1875, 1 Ch. D. 90).

## IX. MISCELLANEOUS.

*Repetition of Legacies.*—If a will gives two legacies of different amounts to the same person, he is entitled to both (*Curry v. Pile*, 1787, 2 Bro. C. C. 225); but if the amounts are the same, the second legacy is *prima facie* deemed a mistaken repetition of the first, and the legatee will only get one (*Early v. Middleton*, 1851, 14 Beav. 453; 2 Coll. 342). But this presumption,

being opposed to the literal import of the will, is very readily rebutted, and parol evidence is admissible for that purpose.

On the other hand, if the first legacy is given by will, and a second legacy of equal amount by a codicil, the legatee will get both (*Wilson v. O'Leary*, 1872, L. R. 7 Ch. 448), unless it can be made out that the second legacy was intended to be given in substitution for the first (*Tuckey v. Henderson*, 1863, 33 Beav. 174).

*Legacies given in succession.*—A legacy of articles which are consumed in being used, such as wines or provisions, to A. for life, and then to B., confers the whole interest on A., and B. will get nothing, even though at A.'s death some of the property remains unconsumed (*Cockayne v. Harrison*, 1872, L. R. 13 Eq. 432).

If absolute gifts of personalty are made to several persons in succession, the first in order who survives the testator will take everything (*In re Lowman*, [1895] 2 Ch. 348, overruling many older cases), although if someone prior in order had survived, he would have taken nothing.

When property of a wasting character, such as leaseholds or terminable annuities, is given to persons in succession, it is the rule that, although the testator may not have in terms directed a sale, nevertheless the property must be sold, and the proceeds invested in trust investments to ensure the remainderman getting the benefit designed for him by the testator. This is commonly known as the rule in *Hove v. Lord Dartmouth*, 1802, 7 Ves. 137; 6 R. R. 96. The converse of this rule, namely, that if the property so bequeathed in succession is reversionary, it must be sold and invested so as to produce income for the benefit of the tenant for life, also holds good (*Harrington v. Atherton*, 1864, 2 De G., J. & S. 352). The application of the rule will be prevented by any indication, showing that the testator intended the property to be retained in specie, such as—

(1) A specific gift (*Thursby v. Thursby*, 1875, L. R. 19 Eq. 395).

(2) The use in the gift of the income of expressions only applicable to the property in its unconverted state (see *In re Game*, [1897] 1 Ch. 881, where, however, it was held that a reference to "rents" of leasehold houses did not sufficiently indicate an intention that they should be retained).

(3) An express trust to sell at the death of the tenant for life (*Rowe v. Rowe*, 1861, 29 Beav. 276).

(4) A power of sale with consent of the tenant for life (*In re Pitcairn*, [1896] 1 Ch. 199).

*Legacies charged on Land.*—Apart from express charge a testator may use language showing that he regards his real and personal estate as one mass or one estate, out of which he gives legacies, which are then by necessary implication charged on the real as well as the personal estate.

Thus a gift of legacies followed by a gift of the "residue of my real and personal estate" shows that the testator considers he has already taken something out of his real estate, which could only be the previous legacies (*Greville v. Brown*, 1859, 7 H. L. 689; *Field v. Peckitt*, 1861, 29 Beav. 568; *Hensman v. Fryer*, 1868, L. R. 3 Ch. 420; see MARSHALLING).

It may be observed that in some respects, especially as regards vesting, legacies charged exclusively on land differ from other legacies. Thus a legacy charged on land, as distinguished from the proceeds of sale of land, carries interest from the testator's death; but this subject belongs rather to the law of charges on land.

*Accounts.*—A residuary legatee, and a legatee whose legacy is payable, but is not going to be immediately paid, are entitled to be informed as to the state of investment of the assets, and generally to information as to the

outstanding liabilities, and to see the accounts, and also to have copies at their own expense, but not at the expense of the estate (*Ottley v. Gilby*, 1845, 8 Beav. 602; *In re Dartnall*, [1895] 1 Ch. 474); and the executor, at any rate after having parted with the funds out of which he could have paid his costs, is entitled to require an applicant for information to undertake to pay the costs of answering the inquiries before incurring any expense in obtaining or giving information (*In re Bosworth*, 1889, 58 L. J. Ch. 433).

[*Authorities.*—Theobald on *Wills*; Seton on *Decrees*, vol. ii. title "Administration"; Williams on *Executors*, vol. ii.]

**Legacy Duty.**—See DEATH DUTIES.

**Legal Assets.**—See ASSETS.

## Legal Estate.

### TABLE OF CONTENTS.

I. The Legal Estate itself: in what cases it passes . . . . .	353	II. The Quantity of such Estate . . . . .	357
		III. Its Devolution . . . . .	358

By legal estate, as used in contra-distinction to equitable estate, we mean that estate or interest of which alone the common law and (before the Judicature Act, 1873) the Courts administering the same took notice. Such an interest may or may not be the beneficial interest in the property: where the legal and the beneficial interest are equal and co-extensive, and unite in the same person, the beneficial is absorbed by the legal (*Selby v. Alston*, 1797, 3 Ves. 338; 4 R. R. 10). For it is an old and well-established principle of English law, that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, although he may have acquired it by an equitable title only, yet, when both estates come together or are subsequently united in him, the legal prevails and the equitable is totally gone. "The equitable estate is absorbed: the better phrase is that it no longer exists" (*Brydges v. Brydges*, 1796, 3 Ves. 126). There is nothing upon which equity can then act; nor, in fact, does the owner of such an estate require the remedy or protection that equity can give, his interest being sufficiently protected by law. The law relating to legal estates is so important and prominent a part of the Law of Trusts and of Mortgages that it is practically impossible to consider the one without touching on the other. We intend here to treat, as far as possible, only of the legal estate of trustees generally, and for this purpose will divide the consideration of the subject into three main heads, viz. :—

I. The legal estate itself: in what cases it passes;

II. The quantity of such estate;

III. Its devolution;

leaving the other aspects of it to be treated of under the above-mentioned titles of TRUSTS and MORTGAGE.

I. In considering in what cases a person, other than the actual beneficiary, will take a *legal estate*, we must first notice the Statute of Uses (27 Hen. VIII. c. 10), and its effects as regards freeholds. In conveyances of freeholds the Statute executes the first, and only the first, use, so that, if there be a grant "to A. and his heirs to the use of B. and his heirs," this leaves no legal estate in A. at all, the legal estate and possession passing by force of



the Statute to B., the person in whom it *executes* the use. The Statute was called the Statute for "transferring uses into possession," and lawyers have long used the words "execute the use" to denote the giving of the legal possession to the person entitled to the use. In order, therefore, to give the actual possession and legal estate to A., the conveyance would take the form of: "To A. and his heirs to the use of A. and his heirs in trust for B. and his heirs." In this case the first use only is executed, and the legal estate remains in A. Those desirous of pursuing this part of the subject at greater length should refer to *Tyrrell's* case (4 & 5 Phil. & Mary), Tudor's *L. C. in R. P. and Conveyancing*, 3rd ed., p. 335; also *Doe v. Passingham*, 1827, 6 Barn. & Cress. 305; *Hopkins v. Hopkins*, 1738, 1 Atk. 589; *Harris v. Pugh*, 1827, 4 Bing. 335. The Statute has no operation in the cases of copyholds and chattels real, the words in the Statute, "where any person shall be seized of lands," being inapplicable (*Walker v. Walker*, 1747, 1 Ves. 54; *Rigden v. Vallier*, 1751, 2 Ves. 257; *Baker v. White*, 1875, L. R. 20 Eq. 166).

But even in the case of freeholds the Statute of Uses does not apply when the grantee takes upon what are called "special" or "active" trusts, e.g. upon trust to pay the income to the beneficiary, or apply it to certain purposes. The distinction between these and the "ordinary" or "permissive" trusts lies in the nature of the duties imposed on the trustee; and it is therefore on the nature of these duties that the question depends, whether or not the Statute executes the use in the person beneficially interested; whether or not the legal estate passes to and remains in the trustee. We may preface the statement of the cases that illustrate what is such an "active" duty by saying that although the Statute of Uses does not apply to wills, yet for the purpose of testing whether or not a testator meant to give the legal estate to his trustees, the Courts have construed his will "as if," as has often been said, "the testator had the Statute in his mind"; in other words, they have been guided by the principle of the Statute in construing the will. "From the time of Lord Raymond it has been settled that a gift to trustees in trust to permit a man to take the rents during his life does not give the legal estate to the trustees without more. It has been treated as analogous to an executed use, not on the ground that the Statute of Uses directly applies to wills because that statute was passed before the Statute of Devises, but upon this ground, that the will showed an intention that the same rules which the Statute of Uses made applicable to settlements of real estate should be applied to the gifts or devises by will. It was therefore an index of intention and nothing more. On that same principle when a man gave real estate to the use of A. upon trust for B., it was held that A. took the legal estate; the language of conveyancers in settlements to which the Statute of Uses applies being so used in the will as to amount to an expression of intention that the same mode of construction should be adopted. Beyond that the Statute of Uses had no direct bearing" (per Jessel, M. R., in *Baker v. White*, 1875, L. R. 20 Eq. at p. 171).

And since the statute does not apply to copyholds it follows that a devise to A. of copyholds in trust for B. is construed so as to give A. the legal estate (*Baker v. White*, *supra*; and see *In re Townsend*, [1895] 1 Ch. 716).

In connection herewith may be mentioned the now exploded theory of attraction, viz. that the effect of a devise together of freeholds and copyholds was that the legal estate in the copyholds which passed to the trustee "attracted" to him also the legal estate in the freeholds. The theory relied for its support on the cases of *Houston v. Hughes*, 1827, 6 Barn. & Cress. 403;

30 R. R. 377, and *Baker v. Parsons*, 1873, 42 L. J. Ch. 228. But there never was any logical reason why the legal estate in the copyholds that passed to the trustee should attract to him the legal estate in freeholds in preference to the legal estate in the freeholds "attracting" the legal estate in the copyholds. Indeed, freeholds being in the eyes of the law more important than copyholds, the contrary theory would have been the more reasonable. And Jessel, M. R., in thus pointing out the fallacy of the reasoning, expressly laid it down that "there can be no such theory of attraction one way or the other" (*Baker v. White*, *ubi supra*).

To proceed with the illustration of special or active trusts. Although in a devise to A. in trust to permit B. to receive the rents the legal estate is executed in B. (*Doe v. Biggs*, 1809, 2 Taun. 109; 11 R. R. 533; *Doe v. Homfray*, 1837, 6 Ad. & E. 206), nevertheless the use of the expression "net rents" implies that the trustees have duties to perform, *i.e.* to collect the gross rents and pay outgoings, etc., and accordingly they take the legal estate (*Barker v. Greenwood*, 1838, 4 Mee. & W. 421 ("on trust to permit and suffer my wife to receive and take all the net rents and profits")). *A fortiori* the trustees take the legal estate when the trust is "to pay the rents to the beneficiary." And the principle may be stated generally that wherever it can be gathered that the trustees are intended to be more than "conduit pipes to feed the uses," they take the legal estate. We may take the following instances:—

(a) A trust followed by a provision for maintenance (*Berry v. Berry*, 1878, 7 Ch. D. 657, where Hall, V.C., said, "The legal estate is vested in the trustees. . . . I found my judgment on the provision for maintenance").

(b) A trust to convey the estate (*Doe d. Shelley v. Edlen*, 1836, 4 Ad. & E. 582; *Doe d. Noble v. Bolton*, 1839, 11 Ad. & E. 188).

(c) A power of sale given to the trustees (*Barker v. Greenwood*, *supra*).

(d) A control or discretion given to the trustees is likewise an indication of the intention that they shall be more than "conduit pipes," *e.g.* a declaration that the receipts of the beneficiary for all rents and profits *with the approbation of any one of the trustees* should be a good and valid discharge (*Gregory v. Henderson*, 1813, 4 Taun. 771; 14 R. R. 665; *Baker v. White*, *loc. cit.*). A power of sale given to the trustees (*Doe v. Ewart*, 1837, 7 Ad. & E. 636).

(e) Where there is a trust to permit a *feme covert* to receive the rents for her sole and separate use, if in a will the legal estate remains in the trustee, but if in a deed, it is executed in the beneficiary if no active duty is to be performed by the trustee (*Harton v. Harton*, 1798, 7 T. R. 652; 4 R. R. 537 (will); *Williams v. Waters*, 1845, 14 Mee. & W. 166; see also *Barker v. Greenwood*, *supra*; *In re Eddel*, 1871, L. R. 11 Eq. 559; *In re Hart, Oxford v. Hart*, 1883, W. N. 164; *Richardson v. Harrison*, 1885, 16 Q. B. D. 185; and for a later case, *In re Townsend's Contract*, [1895] 1 Ch. 716).

And we may sum up the instances generally in the words that whenever "trustees are directed to do anything for the performance of which the legal estate is requisite, they are to have the legal estate" (per Bailey, B., in *Anthony v. Rees*, 1832, 2 Crompt. & J. 83, cited in *Davies to Jones and Evans*, 1883, 24 Ch. D. at p. 194 (*q.v.*)).

Cases, however, have arisen in which by the terms of the trust it is ambiguous whether the trustees have, or have not, active duties to perform, as where the words are "upon trust to pay to or permit" the beneficiary to receive the rents. Of two inconsistent expressions the former prevails in a deed, the latter in a will. Applying this rule of thumb, it was held that in a deed the trustees' functions were active, and that they took the legal

estate; in a will they were permissive only, and therefore the legal estate was executed in the beneficiary. This is the doctrine established by the case of *Doe v. Biggs*, 1809, 2 Taun. 109; 11 R. R. 533. But the tendency of recent decisions has been to distinguish the case of *Doe v. Biggs* when possible. "In *Doe v. Biggs*," said Jessel, M. R., in *Tanqueray-Willarume v. Landau*, 1882, 20 Ch. D. at p. 478, "there was nothing more in the will than a gift to trustees to pay to and permit or suffer a lady to take the rents, and the Court of Common Pleas said that she could not be suffered to take the rents unless she had the legal estate, and that she therefore took that estate. This view contradicted the first part of the trust, because the trustees could not pay without having the legal estate, and therefore the Court cut the knot by saying that in a will the last words must prevail, and therefore the first words must be rejected. Such a case as that, decided on such narrow grounds, cannot be treated as establishing any principle applicable to other cases." And many titles having been accepted on the principle of *Doe v. Biggs* (cp. *Baker v. White*, *supra*), the Courts have been unwilling to question the authority of the case itself, but, on the other hand, have allowed the least indication of intention to give the legal estate to the trustees, to guide them in their construction of the will. Accordingly where a testator devised all his freehold and copyhold estates to his wife and son, and declared that his real and personal estates were devised and bequeathed to them "upon trust to pay the rents, issues, and profits, and the interest, dividends, and income of his said real and personal estates unto or permit the same to be received" by his wife during her life and remainder to his son, it was held that the legal estate in the realty was not limited to the widow for life with remainder to the son, but was vested in the two as joint-tenants in fee. The case was thus distinguished from *Doe v. Biggs*. "Here . . . the wife is one of the trustees, effect can therefore be given to both sets of words; the other trustee having a legal estate as joint-tenant could pay to her or he can permit her to receive, which she as one of the joint-tenants is competent to do. There is therefore no need to apply the rule of thumb, and say that the latter words are inconsistent with the former, and are to prevail." And in a more recent case (*In re Lashmar*, *Moody v. Penfold*, [1891] 1 Ch. 258) *Doe v. Biggs* was described by the Court of Appeal as an anomaly so known and understood by conveyancers; and though the Court explained its unwillingness to disturb cases on which conveyancers have relied, its principle was declared unsound.

Charges of debts also require detailed consideration with respect to their conferring or not the legal estate on the trustees. It is the general rule that in a devise of the legal estate to trustees charged with the payment of debts in trust for beneficiaries without any direction, or words amounting to a direction to trustees to pay the debts, the legal estate is executed in the beneficiary, and does not remain in the trustee. Ambiguities, however, arise when the direction to pay debts is not in its terms clearly a direction to the trustees. But it has now been established that a direction to pay debts (without saying by whom), coupled with a devise to trustees who are also named as executors, gives them the legal estate (*Creaton v. Creaton*, 1856, 3 Sm. & G. 386); and in *Kenrick v. Beaucherk*, 1802, 3 Bos. & Pul. 175; 6 R. R. 746, a direction to pay debts, though not in terms a direction that they should be paid by the executors, was held sufficient evidence of the testator's intention to give to the trustees the legal estate as necessary to enable them to discharge their duty of paying the testator's debt out of his realty. And see *Tanqueray-Willarume v. Landau*, *ubi supra*; *Marshall v. Giffell*, 1882, 21 Ch. D. 790; in the latter case the testator, after directing

his debts to be paid (without saying by whom), devised realty to four persons, whom he afterwards appointed executors upon trust for a daughter for life, and remainder to her children. The principles laid down in the above cases (see also *Spence v. Spence*, 1862, 12 C. B. N. S. 199) were expressly approved in *In re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43). There the testatrix, after directing her debts to be paid, devised a freehold messuage to her sons upon certain trusts, and appointed her said sons executors. If the sons had not as trustees taken the legal estate in fee, the remainder given under the trusts would have been a legal contingent remainder, and under the circumstances of the case would have failed because there was no estate of freehold to support it. It was held that the direction to pay debts was sufficient to show that "in the specific devise to her two sons and their heirs, in trust for her son Henry and his children, the testatrix did not mean to avail herself of the machinery of the Statute of Uses, or to make them mere conduit pipes of the legal estates; but that, on the contrary, she intended that the legal estate should pass on, and not through, them in trust, according to the modern signification of the term 'trust'" (per Chitty, L.J. (then J.), in *In re Brooke, ubi supra*, at p. 52).

There is yet another way in which the legal estate may pass, and this is due to statutory intervention, viz. by a vesting declaration. The older statutory provisions in this behalf are now replaced by sec. 12, subsec. 1, of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which provides that where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall without any conveyance or assignment operate to vest in those persons as joint-tenants, and for the purposes of the trust that estate, interest, or right (see for greater detail *Appointment of New Trustees*, sub tit. TRUSTS); and where a mortgagor of lands by a deposit of deeds declared himself trustee of the legal estate for the mortgagee, and afterwards conveyed the fee to a subsequent incumbrancer with notice of the prior mortgage, it was held that new trustees appointed in lieu of the mortgagor by the mortgagee were trustees "for performing the trust" within the meaning of the subsection above quoted, and that a vesting declaration in the deed appointing new trustees operated to vest the legal estate in them (*London and County Bank v. Goddard*, [1897] 1 Ch. 642).

II. As to the *quantity* of the estate taken by the trustee, the general rule is that he takes as much and no more as is sufficient for him to perform the duties of his trust. Secs. 30 and 31 of the Wills Act (1 Vict. c. 26) should first be noticed. They enact as to wills since 1837 that—

(30) Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

(31) Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the

testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied. The effect of the two sections, which are rather ambiguous, is stated by Mr. Jarman to be "that trustees whose estate is not expressly defined by the will must in every case and *whatever be the nature of the duty imposed upon them*, take either an estate for life or an estate in fee" (quoted in Shelford's *Real Property Statutes* at p. 433).

The law has, however, established certain principles for ascertaining the intention of the testator as to the quantity of estate he meant to give to the trustees. *Prima facie* by a devise to him and his heirs the trustee takes a fee. In *Doe v. Davies*, 1841, 1 Q. B. 430, it was laid down that if the devise be for purposes which are to last for a time certain, the word "heir" will not give a fee, but that the estate will be cut down; but, on the other hand, if no definite time limit can be given at which the trustee's duties will be over, then there can be no cutting down of the fee. The cases and rules are reviewed in the judgment of Jessel, M. R., in *Collier v. Walters*, 1873, L. R. 17 Eq. 252, where it was laid down that a general devise to trustees and their heirs under a will the purposes of which require them to have some legal estate of freehold, *prima facie* gives the fee, and it lies on the parties alleging that they have taken a less estate to show what less estate will serve the purpose. A trust to let which could not be confined to an authority to let from year to year, and certain directions as to timber, are grounds for not cutting down this estate.

And a power of leasing (*In re Eddell*, 1871, L. R. 11 Eq. 559) and a power of maintenance (*Berry v. Berry*, 1878, 7 Ch. D. 657) have likewise been held grounds for not cutting down the estate in fee to which the trustee is presumably entitled. So have directions to pay debts (*Tanqueray-Willauve v. Landau*, *ubi supra*; *Marshall v. Gingell*, *ubi supra*, and the other cases on "charges of debts" above cited). And in a recent case freeholds and copyholds were given to trustees, their heirs and assigns, upon trust to pay the rents and profits to the testator's wife during her life for her separate use, and after her death as she should appoint, and in default of appointment to her in fee. The proposition that the trustees took the legal estate only during the wife's life was held to be untenable. "Among the rules which are to be applied," said Stirling, J., "to gifts both of freehold and copyhold to trustees is this, that where you find words of devise to trustees and their heirs, then those words are to have their full natural effect, as giving an estate of inheritance to the trustees, unless something is found on the face of the will which cuts that estate down in some determinate event." There are four cases which show that: *Doe v. Davies*, *ubi supra*; *Poad v. Watson*, and *Collier v. Walters*, *ubi supra*; *In re Townsend's Contract*, [1895] 1 Ch. at p. 720).

III. *The Devolution of the Legal Estate*.—Trustees being joint-tenants the legal estate on the death of one of them goes to the survivors. But to consider the devolution of the legal estate of a sole (including a last surviving) trustee, and the power of such trustee to affect such devolution by testamentary disposition, it is necessary to notice the provisions of the statute law in that behalf.

#### 1. *As to devolution on intestacy.*

The legal estate of a sole trustee dying intestate before the coming into operation of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), descended as to freeholds to his heir-at-law, as to copyholds to his customary heir.

The Vendor and Purchaser Act, 1874, enacted (s. 5) that upon the

death of a *bare trustee* of any corporeal or incorporeal hereditament of which such trustee was seized in fee-simple, such hereditament should vest like chattels real in the legal personal representative from time to time of such trustee. The accepted definition of a bare trustee is that given by Hall, V.C., in *Christie v. Ovington*, 1875, 1 Ch. D. 279, viz. "a trustee to whose office no duties originally attached, or who, although such duties were originally attached to his office, would on the requisition of his *cestui-que trust* be compellable in equity to convey the estate to them or by their direction." This definition has been held to mean that a trustee who has active duties to perform, although he has no beneficial interest in the trust property, is not a "*bare trustee*" within the meaning of the section (*In re Cunningham and Frayling*, [1891] 2 Ch. 567). Sec. 5 of the Vendor and Purchaser Act was repealed and re-enacted in a modified form, with the addition of the word *intestate* after bare trustee, by sec. 48 of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87); and see *Christie v. Ovington*, *ubi supra*.

It was not until the passing of the Conveyancing Act, 1881, that the testamentary disposition of his legal estate by a sole trustee, as well as the devolution on intestacy of such an estate, was interfered with. The Act repealed secs. 5 and 48 of the Vendor and Purchaser Act and Land Transfer Act respectively, and enacted that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations as if the same were a chattel real vesting in them or him; and for the purposes of this section the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns within the meaning of all trusts and powers.

The Act thus abolishes the distinction for the purposes of devolution between bare trustees and ordinary trustees, and was held to apply to copyholds as well as freeholds (*In re Hughes*, 1884, W. N. p. 53). The Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45, enacted that the above section of the Conveyancing Act should not apply to land of copyhold or customary tenure, vested in the tenant on the Court rolls of any manor upon trust or by way of mortgage; and it was held in *In re Miles*, 1887-88, 37 Ch. D. 312; 40 Ch. D. 14, that the effect of the section was to repeal entirely sec. 30 of the Conveyancing Act as regards copyholds; so that if a sole trustee of copyholds had died between the commencement of the Conveyancing and Law of Property Act and the passing of the Copyhold Act the legal estate in the copyholds, which by virtue of sec. 30 had on his death devolved upon his personal representatives, was on the passing of the Copyhold Act divested from them, and vested in his customary heir or devisee.

But nevertheless the validity of any disposition of the property made by the personal representatives before the passing of the Copyhold Act would be unaffected by that Act.

The section of the Copyhold Act, 1887, is replaced by sec. 88 of the

Copyhold Act, 1894 (57 & 58 Vict. c. 46), to the same effect. So that now in the case of copyholds the legal estate of a sole trustee dying after the 16th of September 1887 (the coming into operation of the Copyhold Act) devolves to his customary heir and is devisable by his will.

As to devolution of the legal estate on the bankruptcy of a trustee, it is only necessary to say here that sec. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), expressly exempts from property divisible among the creditors of a bankrupt property held by the bankrupt on trust for any other person; and to refer the reader to the article **BANKRUPTCY**.

The incidents of the legal estate, including the obligations it imposes and the rights that it confers on the taker, are beyond the scope of this article, and will be found under **TRUSTS**; **MORTGAGE**.

The right to priority given under certain circumstances by the legal estate is treated of under **PRIORITIES**.

**Legal Estate in Copyholds.**—See **COPYHOLD**. The estate of a bankrupt in copyholds vests in his trustee in bankruptcy, and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), re-enacting in effect the provisions of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), provides (s. 50, subs. 4) that where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance, or in any similar manner, the trustee in bankruptcy shall not be compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being, and had been duly, surrendered or otherwise conveyed to such uses as the trustee in bankruptcy may appoint; and any appointee of the trustee in bankruptcy shall be admitted to or otherwise invested with the property accordingly.

**Legal Expenses.**—As to the expenses that may be legally incurred by candidates at parliamentary and other elections, see **ELECTION EXPENSES**.

**Legal Fraud.**—There would appear to be no real difference between “legal fraud” and “fraud” (*Derry v. Peek*, 1889, 14 App. Cas. 337). It was held in that case that to maintain an action of deceit the plaintiff must prove actual fraud. See **COMPANY**, vol. iii. p. 186; **FRAUD**.

**Legal Heirs.**—See **HEIRS**; **LAWFUL HEIRS**.

**Legal Incapacity.**—Women are subject to a “legal incapacity” to vote at the election of members of Parliament, within sec. 3 of the Representation of the People Act, 1867 (*Chorlton v. Lings*, 1868, L. R. 4 C. P. 374). See also *Beresford-Hope v. Sandhurst*, 1889, 23 Q. B. D. 79; *De Souza v. Cobden*, [1891] 1 Q. B. 687.

**Legalisation**—A term used on the Continent to describe the sequence of official signatures authenticating each other. Thus a power of attorney executed in England for use in a French notarial document must

not only be signed by the person delivering it, but his signature must be authenticated by a French consular officer or an English notary public, whose signature must be so authenticated, and the consular signature must in turn be authenticated by the proper officer at the French Ministry of Foreign Affairs. These official signatures are called legalisations.

**Legal Medicine.**—See FORENSIC MEDICINE; MEDICAL JURISPRUDENCE.

**Legal Merchandise.**—In *Cockburn v. Alexander*, 1848, 18 L. J. C. P. 74, it was held that under the words "other legal merchandise" in a charter-party, the charterer was at liberty to ship any lawful articles he pleased (due regard being paid to the safety of the vessel).

**Legal Mortgage.**—See MORTGAGE.

**Legal Notice to Quit.**—In sec. 50 of the County Courts Act, 1856, the words "legal notice to quit" meant a notice to quit required by law, and not one depending on the stipulation of the parties (*Friend v. Shaw*, 1887, 20 Q. B. D. 374). In the corresponding section of the County Courts Act, 1888—s. 138—the word "legal" is omitted; the words being merely "notice to quit." See NOTICE TO QUIT.

**Legal Practitioner.**—See ADVOCATE; BAR; SOLICITOR.

**Legal Proceedings.**—A winding-up petition is not a "legal proceeding" within the meaning of articles of association which enable the directors of a company to direct any action or other "legal proceedings" to be taken on behalf of the company (*Smith v. Duke of Manchester*, 1883, 24 Ch. D. 611).

**Legal Process.**—See PROCESS.

**Legal Representatives.**—The words "personal representatives," "legal representatives," or "legal personal representatives," when applied to personal estate, and not controlled by a context, "are to be construed as equivalent to 'executors and administrators,' and consequently as words of limitation, when they follow a limitation for life to the person to whose representative the property is given, and as a gift to the 'executors and administrators' in that capacity when there is no such limitation" (per Malin, V.C., in *Stockdale v. Nicholson*, 1867, L. R. 4 Eq. 359, 365). In a gift to one for life, and after his decease to his children "then living or their legal personal representatives, share and share alike," it was held that "legal personal representatives" meant "next-of-kin" (*King v. Cleaveland*, 1858, 26 Beav. 26); so also where there was a direction in a settlement "to pay to legal representatives in a due course of administration," the words



were construed as meaning next-of-kin (*Briggs v. Upton*, 1871, L. R. 7 Ch. 376).

A husband who, *jure mariti*, succeeds to leasehold property which belonged to his deceased wife as separate estate, without taking out administration, is her "legal personal representative" within the meaning of sec. 23 of the Married Women's Property Act, 1882, so as to be liable to the extent of such separate estate for his wife's debts (*Surman v. Wharton*, 1891, 60 L. J. Q. B. 233).

See EXECUTORS AND ADMINISTRATORS; LAND TRANSFER; NEXT-OF-KIN; REAL REPRESENTATIVE.

[*Authority*.—Jarman, *Wills*, 5th ed., vol. ii. pp. 957–960.]

**Legal Reversion.**—See REVERSIONS.

**Legal Rights.**—A person threatened with legal proceedings, in respect of any alleged manufacture, use, sale, etc., by him of an invention, by the person claiming to be the patentee of such invention, may obtain an injunction against the continuance of the threats, and may recover such damage (if any) as may have been sustained, if the alleged manufacture, use, sale, etc., to which the threats referred was not an infringement of any "legal rights" of the threatener, unless the latter with due diligence commences and prosecutes an action for infringement of his patent (Patents Act, 1883, s. 32). If the threatener has no valid patent he has no "legal rights," within the meaning of this section, that can have been infringed (see *Herrburger v. Squire*, 1888, 5 R. P. C. 581; and other cases cited in Edmunds, *Patents*, 2nd ed., p. 625). See PATENTS.

**Legal Tender.**—See COIN, BRITISH, vol. iii. p. 75.

**Legal University.**—See INNS OF COURT.

**Legate**—The Pope's ambassador-extraordinary to a foreign sovereign or State professing the Roman Catholic faith. As a diplomatic agent, a legate enjoys the representative character and exercises papal jurisdiction where the Pope cannot be present. The missions of a legate are usually of a more or less ecclesiastical and special character, thus differing from the mission of a Nuncio (*q.v.*), which is usually political and permanent. Legates are always chosen from among the College of Cardinals. See ARCHBISHOP, vol. i. p. 312; and see vol. vii. p. 384.

**Legation.**—See DIPLOMATIC AGENTS.

**Legislation.**—See LEGISLATIVE POWERS; PARLIAMENT.

**Legislation (Comparative), Society of**, constituted in 1894–95 for the purpose of "promoting knowledge of the course of legis-

lation in different countries, more particularly in the several parts of Her Majesty's dominions, and in the United States," is an association formed on the model of a French society bearing the same name. A "statement" of the objects of the society says that they are "both practical and scientific. The society is intended to be of service to legislative bodies, practising lawyers, jurists, and students of sociology. . . . It will gather together, epitomise, and arrange materials now scattered through many periodicals, or to be found only in official documents of which few libraries contain copies, and it will otherwise endeavour to promote the study of comparative law. Chief among its aims will be the collecting of information as to the statute law, and the forms and methods of legislation in the British Empire and the United States. . . . In the British Empire are some sixty legislatures; in the United States are nearly fifty. Each of them is occupied with much the same problems. The same questions as to criminal law and the administration of justice, capital and labour, marriage and divorce, patents and literary property, the regulation of the sale of intoxicating liquors, education, railways, companies, bankruptcy, merchant shipping and mercantile law generally, come from time to time before the British and Colonial Parliaments, and the legislatures of the States of the American Union. Experiments as to similar subjects are being made by more than a hundred legislatures in English-speaking countries."

The society published in August 1896 the first number of a Journal (pp. 270) which is to serve as its medium. This number gave a summary of the legislation of the empire, notes on the State legislation of America (Albert Gray), articles on the application of European law to natives of India (Sir C. Ilbert), and to natives of Ceylon (L. B. Clarence), and on the German Civil Code (E. J. Schuster).

The French society of the same name publishes an *annuaire* in about 650 pages, giving translations of all the chief laws of the year throughout the world, classified according to country, a monthly bulletin in seven numbers, making a volume of about 650 pages, and giving articles, reviews of books, etc., and a volume in about 270 pages containing the legislation of the year in France, with notes.

Besides the *Société de législation comparée*, there is in Paris the *Comité de législation étrangère*, an official body whose admirable library, located at the Ministry of Justice in the Place Vendôme, is open to the public, and who publish translations into French of the more useful codes of foreign countries. In the course of the twenty-one years of its existence it has already issued eighteen such volumes.

**Legislative Powers.**—Besides the Imperial Parliament, there are numerous other bodies which possess legislative powers. The most important of these within the British Empire are the various colonial legislatures, which have extensive powers of legislation, yet not so extensive as those possessed by the Imperial Parliament, which, being a constituent as well as a legislative body, can pass statutes altering the constitution of the country. Colonial legislatures, like those of various foreign nations, have power only to pass such statutes as are not repugnant to the constitution of the colony; statutes which are repugnant to the constitution may be adjudged *ultra vires* and void. Other bodies, such as government departments, municipal corporations, railway companies, etc., exercise a species of legislative power in framing regulations and by-laws under the authority of particular Acts of Parliament (see the question of legislative

powers fully dealt with in Dicey, *Law of the Constitution*, 5th ed., ch. ii.). See COLONY.

**Legislature.** — The expressions “colonial legislature” and “legislature” when used with reference to a British possession, in Acts passed after 31st December 1889, mean, unless a contrary intention appears, the authority, other than the Imperial Parliament or Her Majesty the Queen in Council, competent to make laws for a British possession (Interpretation Act, 1889, s. 18, subs. 7). See COLONY; HOUSE OF COMMONS; HOUSE OF LORDS; PARLIAMENT.

**Legitimacy.** — At English law, a person born anywhere either in wedlock or within the *ultimum tempus pariendi* (see MEDICAL JURISPRUDENCE) after its determination is legitimate; so also is anyone born out of wedlock whose parents afterwards marry, if both the law of the father's domicile at the birth and the law of his domicile at the marriage coincide in allowing *legitimatio per subsequens matrimonium* (2 Black. Com. 247; Dicey, *Conflict of Laws*, p. 496. See *In re Goodman's Trusts*, 1880, 14 Ch. D. 619; 1881, 17 Ch. D. 266; *In re Grove, Vaucher v. The Solicitor to the Treasury*, 1888, 40 Ch. D. 216, and the cases cited therein).

Persons recognised in England as legitimate will be found, as a rule, to fall under one of the heads of the foregoing classification. Blackstone, indeed, credits Parliament, in its “transcendent power” (1 Com. 459), with the right of legitimating bastards, but he cites no modern instance. The Townshend Peerage (1842, 10 Cl. & Fin. 289) is an example of Parliament passing a private Act to declare children illegitimate without dissolving a marriage. The question has been mooted whether our Courts will allow the legitimacy of persons born out of wedlock, but declared legitimate by the decree of a foreign ruler, as, for example, of the Czar (see Dicey, *Conflict of Laws*, p. 507).

Bastardy being by English law indelible, the status of legitimacy cannot be attained by any person born out of wedlock, if the father's domicile was English at the date of the birth (see *s.v.* BASTARD). The rule is inflexible; *legitimation*, in its various forms, is unknown: “adoption”; “recognition”; the custom of *pallio cooperire*; the *legitimatio per subsequens matrimonium* itself, all but universal in Christendom, as it is; have no place in our municipal law.

Legitimacy is not dependent upon nationality or upon naturalisation or allegiance; it is a personal status accompanying its possessor wherever he goes. The comity of nations recognises those persons as legitimate everywhere who are legitimate by the law of their place of origin; and, for this purpose, the place of a person's origin is the domicile of the father. The domicile of the mother, the place of the child's birth, the *lex loci contractus* (provided the marriage be valid) are circumstances all alike immaterial in respect of legitimacy.

The chief consequences of legitimacy have regard to property and to the conditions of its devolution, to heirship, to the operation of the Statutes of Distribution, and so forth. In these respects, with one remarkable exception, English law accords to all persons who are legitimate by the laws of their several domiciles every right which belongs to persons born in England of parents lawfully married. The exception is to be found in the rigid rule which denies to a person born before wedlock, but legitimated

*per subsequens matrimonium*, the full status of heirship. No *ante-natus* can be an heir at English law. Heirship is determined by the *lex loci rei sitæ*; and accordingly, upon an intestacy, the real estate cannot be inherited except by a person who is not merely legitimate, but legitimate *sub modo*, that is to say, legitimate by reason of having been born in lawful wedlock. "Hæres, in the legal understanding of the common law, implyeth," says Coke (*Litt.* 7 b), "that he is *ex justis nuptiis procreatus*; for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood do descend of some estate of inheritance. For *solus Deus hæredem facere potest, non homo*" (see also *The Mirror*, cap. ii. s. 15; Glanville, vii. cap. 13). Full effect is given, in all other circumstances, to *legitimatio per subsequens matrimonium* (see *Skottow v. Young*, 1871, L. R. 11 Eq. 474; *In re Goodman's Trusts*, 1880 and 1881, *ut supra cit.*; *In re Andros*, 1883, 24 Ch. D. 637; *In re Grey's Trusts*, [1892] 3 Ch. 38). But where heirship is concerned, the principle is maintained that none but a person born in wedlock can inherit real estate; the rule is "not of a personal character but of that class which is sown in the land, springs out of it, and cannot be abrogated or destroyed by any foreign rule of law whatsoever" (Alexander, C.B., 2 Cl. & Fin. 577, in *Birtwhistle v. Vardill*). The cases are *Birtwhistle v. Vardill*, 1835, 2 Cl. & Fin. 571; 1840, 7 Cl. & Fin. 895; and *Fenton v. Livingstone*, 1859, 3 Macq. H. L. Cas. 497, 556. Chattels real, however, appear not to follow the *lex loci rei sitæ*. The principle of exclusion applies, *à fortiori*, to the succession to a peerage or other hereditary dignity, which cannot in any event be the subject of testamentary disposition. It remains, in this connection, to notice the case of *In re Don's Estate*, 1857, 27 L. J. Ch. 98, per Kindersley, V.C., which decided that at the death of a Scotch *ante-natus*, duly legitimated, his father was not, upon an intestacy, "heir" to lands situated in England, within the meaning of 3 & 4 Will. iv. (1833), c. 106, s. 6, which enacted that "every lineal ancestor shall be capable of being heir to any of his issue"; here the person claiming to be "heir" was undoubtedly himself "*ex justis nuptiis procreatus*," and the decision was justified only by interpreting "issue" to mean "issue *ex nuptiis procreatus*"; a conclusion which is certainly an extension of the rule in *Birtwhistle v. Vardill*.

The general question of the validity of marriages belongs to the subject of matrimonial law. Here it will be sufficient to state the broad rule which is followed by the English Courts in determining what marriages entered into (whether abroad or at home) by persons domiciled in England are valid, for the purpose of conferring upon the offspring the status of legitimacy. Mere irregularity does not necessarily invalidate a marriage. But some statutes forbid and render void *ab initio* certain matrimonial unions; thus, 12 Geo. III. c. 11 (The Royal Marriages Act, 1772) makes illegitimate the issue of any marriage contracted in defiance of its provisions (see *The Sussex Peerage case*, 1844, 11 Cl. & Fin. 85); and 5 & 6 Will. iv. c. 54 (The Marriage Act, 1835) renders void unions contracted contrary to the table of prohibited degrees. Before the last-named Act such unions were voidable, but not necessarily void, and if any such union was not declared void during the lifetime of both the parties, the offspring were legitimate. In the present state of law, no person domiciled in England can marry (*e.g.*) his deceased wife's sister in this country or elsewhere.

As a rule, marriages contracted in England or abroad are valid, provided that they are not repugnant to our *lex fori*, nor contrary to religion or sound morality (see *Fenton v. Livingstone*, 1859, 3 Macq. H. L. Cas. 497). Where the domicile of one of the contracting parties is English, the marriage must be

in accordance with the general principle of "Christian marriage" or "marriage in Christendom"; and the essence of Christian marriage is "the voluntary union for life of one man and one woman to the exclusion of all others" (*In re Bethell*, 1888, 38 Ch. D. p. 220). If the system under which the parties marry contemplates polygamy, the marriage will be invalid, even though in the particular case they intend to enter into a monogamous relation. See *In re Bethell*, *supra cit.* (a marriage according to Baralong usage); *Hyde v. Hyde and Woodmansee*, 1866, L.R. 1 P. & D. p. 130 (a Mormon marriage); *Brinkley v. A.-G.*, 1890, 15 P. D. p. 76 (where a monogamous Japanese marriage was held good).

Given a valid marriage, the children born of the wife during its continuance, or within "a possible time" after its determination, are deemed to be legitimate, unless the contrary be established. *Pater est quem nuptia demonstrant* (Co. Litt. 7 b), and *semper præsumitur pro legitimatione puerorum et filiatio non potest probari* (5 Co. 98 b), are ancient maxims which still hold good (see Broom's *Legal Maxims*, 1884, 6th ed., ch. vii., "Rules relating to Marriage and Descent"; Best on *Presumptions of Law and Fact*, 1844, pp. 21, 71, 171; Fleta, lib. i. ch. 14, *De Legitimis*, and lib. vi. ch. 1, *De Propinquitatē Hæredum*; Stephen, *Law of Evidence*, "Presumption of Legitimacy" (art. 98); see also *sub voc.* BASTARD).

The presumption of legitimacy is not a *presumptio juris et de jure*; of old the presumption was carried so far that if the husband were within "the four seas" during the period within which the child must have been begotten, evidence was not admissible to prove non-access (Co. Litt. 244 a); but the rule *inter quatuor maria* has long been obsolete. (See also *sub voc.* POSTHUMOUS CHILD.) Now, subject to certain conditions, the question of a person's legitimacy is a matter left perfectly open, to be determined by the weight of evidence in accordance with the ordinary rules of evidence (see *Morris v. Davies*, 1827, 3 Car. & P. 215, 427, and 1837, 5 Cl. & Fin. 163; *Bosville v. A.-G.*, 1887, 12 P. D. 177; Le Marchant's report of the *Gardner Peerage* case). The conditions referred to are well known. First, neither the mother of the child nor the husband is admissible as a witness to testify to the fact of access or non-access; a "rule of decency" forbids such evidence (see *Goodright v. Moss*, 1777, 2 Cowp. 594, per Lord Mansfield, C.J.; and the other cases collected *sub voc.* BASTARD, and in Stephen's *Evidence*, *ut supra cit.*); but testimony may be given, *aliunde*, of statements made by the mother or by the adulterer as evidence of conduct (see *The Aylesford Peerage* case, 1885, 11 App. Cas. p. 1; *Burnaby v. Baillie*, 1889, 42 Ch. D. 282). Secondly, where the husband and wife have cohabited within "a competent time," so that it is possible for the child to have been lawfully begotten, the presumption of legitimacy is not to be rebutted by evidence that someone else may with equal probability be the father (see Best, *Presumptions*, s. 58; and per Vaughan, B., at pp. 217, 218, of *Morris v. Davies*, 1827, 3 Car. & P.). Under such circumstances the law will not allow "a balance of the evidence as to who is most likely to have been the father" (*Cope v. Cope*, 1833, Moo. & R. 276). And generally, the Court will not allow the inference of law arising from the relation of husband and wife "lightly to be repelled," or "to be broken in upon or shaken by a mere balance of probability" (per Lord Lyndhurst in *Morris v. Davies*, 1837, 5 Cl. & Fin. p. 265). The case of *Bosville v. A.-G.* (*ut supra cit.*, 1887, 12 P. D. 177) is an illustration of the perfect freedom with which the Courts in modern times have brought the presumption of legitimacy to the test of evidence. (See *sub voc.* LIS MOTA.)

It remains to state the various means by which in English Courts the fact of legitimacy or illegitimacy may be established. Before 1858 there was no legal procedure by which a person could directly raise the question of his own or anybody else's legitimacy. Such an issue could only be determined as part of a larger issue. Unless a man claimed a peerage or an estate, there was small chance of any judicial pronouncement upon his legitimacy. Persons were sometimes bastardised in the case of divorces, by Act of Parliament; but long before the establishment of the Divorce Court the practice had been not to add a bastardising clause to a Private Bill of Divorce, though the House of Lords received the evidence that went to prove the illegitimacy of the issue of a marriage which was being dissolved (see *Hayne's Divorce* case, 1829, Macq. H. of L. Practice, 650; cp. *Lord Townshend's Peerage*, 1843, 10 Cl. & Fin. 289). The House was especially loth to decide the status, as to legitimacy, of children who were under age. It was possible, however, to file a Bill in Chancery for the purpose of perpetuating evidence (see *Lord Townshend's Peerage*, *ut supra cit.*); but this was the nearest resemblance in English law to the Scotch action of "declarator" of bastardy. In 1849 Lord Brougham endeavoured to introduce the action of "declarator" into English law, and brought in a Bill for that purpose; but though he had the approval of Lords Lyndhurst and Campbell, the measure was not carried. The Statute 20 & 21 Vict. c. 85 (The Matrimonial Causes Act, 1857), which established the Divorce Court, contained no bastardising clause, and left the question of legitimacy untouched.

In 1858 the Legitimacy Declaration Act (21 & 22 Vict. c. 93) became law. The passing of the Act is said to have been due to the famous case of *Shedden v. Patrick*, 1854, 1 Macq. Sc. App. 535. But it followed naturally upon the Divorce Act, though it has not provided English law with the process of declarator of bastardy. The Legitimacy Declaration Act has been stated to be "not a model either of arrangement or composition" (Macq. *Marriage and Divorce*, p. 349). Sir J. Hannen (*Dodds v. A.-G.*, *ut infra cit.*) criticised it as "difficult to construe," and as failing to give all the relief intended by its drafters. It is entitled "An Act to enable Persons to establish Legitimacy and the Validity of Marriages, and the Right to be deemed natural-born subjects," and, by sec. 1 it provides that—

"Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person being so domiciled or claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to determine such application and to make such decree. . . ."

Sec. 2 enacts that a person "so domiciled or claiming as aforesaid" may establish his right to be deemed "a natural-born subject" (see *sub voc.* NATURAL-BORN SUBJECT; and *Shedden v. A.-G.*, 1860, 2 Sw. & Tr. 170), and may include such application in the same petition with an application as to legitimacy or validity of marriage under sec. 1. By sec. 6 it is provided that the Attorney-General "shall be a respondent" in all proceedings under the Act; sec. 7 provides for citing other persons "to see proceedings"; sec. 8 saves the rights of persons not cited; sec. 9 applies solely to Scotland; sec. 10 declares that proceedings under the Act shall not affect any final judgments

already pronounced; sec. 11 provides that this Act, and the Matrimonial Causes Act, 1857, shall be construed together as one Act; secs. 3, 4, and 5 deal with procedure and costs. In *Bain v. A.-G.*, [1892] Prob. 266, Kay, L.J., observed: "The Legitimacy Declaration Act was, I presume, intended to supersede in legitimacy cases the old plan of instituting a suit to perpetuate evidence." The Attorney-General is a necessary respondent (*Shedden v. A.-G.*, 1860, 2 Sw. & Tr. 170); and it is his duty to traverse the allegations of the petition and see that they are proved. It is for the petitioner, under the directions of the Court, to cite other persons to see proceedings (*In re Upton's Pet.*, 1863, 32 L. J. P. M. & A. p. 177; *Brinkley v. A.-G.*, 1889, 14 P. D. p. 83); and a person so cited and appearing to oppose may be made to pay costs (*Bain v. A.-G.*, [1892] Prob. 217, and 261). But a person not cited who has no real interest will not be allowed to intervene (*In re Upton's Pet.*, *ut supra cit.*). Sec. 10, as to final judgments, does not prevent a petition from being presented under this Act, but merely provides that the result shall not affect any *res judicata* (*Shedden v. A.-G.*, 1860, 2 Sw. & Tr. 170). In the case of an infant, a petition may be brought in the child's name for its interests, but a hostile person will not be allowed to present a petition for the mere purpose of bastardising the child; nor will the question of an infant's legitimacy be entertained upon a petition for variation of settlements (*Pryor v. Pryor*, 1888, 12 P. D. p. 165; and see *The Times* of 21st December 1897, *Douglas v. Douglas and Trevor*). In the child's interests the Court will direct the official solicitor to file a petition in the child's name (*In re Chaplin*, 1867, L. R. 1 P. & M. 328). The Court cannot decide the right to any title of honour (e.g. a baronetcy). For other examples of the working of the Act, see *Shaw v. A.-G.*, 1870, 2 P. & D. p. 156; *Frederick v. A.-G.*, 1874, L. R. 3 P. & D. pp. 196 and 270; *Shilson v. A.-G.*, 1874, 22 W. R. 831; *Mansel v. A.-G.*, 1877, 2 P. D. p. 267; *Dodds v. A.-G.*, 1880, 42 L. T. 402; *Scott v. A.-G.*, 1886, 11 P. D. 128; *Bosville v. A.-G.*, 1887, 12 P. D. 177; *Brinkley v. A.-G.*, 1889, 14 P. D. 83, and 1870, 15 P. D. 76; *Gardner v. A.-G.*, 1889, 60 L. T. p. 839; *Dundas v. A.-G.*, *Times*, 28th November 1896. There is a right to appeal without leave in cases under this Act (see 44 & 45 Vict. c. 68, 1881, s. 9), first to the Court of Appeal, then to the House of Lords.

[*Authorities.*—Macqueen, *Marriage and Divorce*, c. xxxi. 1860; Weightman, *Marriage and Legitimacy*, 1871; Hammick, *Marriage Law of England*, 2nd ed., 1887; Brown and Powles, *Divorce Law*, 6th ed., 1897, pp. 360–374; Hubback, *Evidence of Succession*; Story, *Conflict of Laws*; Dicey, *Domicile*, 1879, *Conflict of Laws*, 1896; Westlake, *International Law*; Foote, *Private International Law*.]

**Lent** — The chief fast or holy season (lasting forty days) of the Church, which has been observed from a very early period. Lent commences on Ash-Wednesday and extends for forty days, not including Sundays (see FEASTS). In former times Lent was the period selected for the performance of solemn penances (*solemnis pœnitentia*) for the greater sins, such as incest and the like, which had occasioned a great scandal in the State (as to which, see *Constitution of Archbishop Peckham*, Lind. Prov. p. 339; Johnson, *Canons*, vol. ii. p. 7; Phillimore, *Ecc. Law*, vol. ii. 1066, 2nd ed.). The Holidays and Fasting Days Act (5 & 6 Edw. VI. c. 3, s. 4) provides that nothing therein contained shall extend to abrogate or take away the abstinence from flesh in Lent.

**Lep and Lace**—A custom in the manor of Writtle, in Essex, that every cart going over Greenbury within that manor (except the cart of a nobleman) should pay fourpence to the lord (Blount, *Law Dict.*).

**Lèse-majesté** is an insult offered to, or an offence committed against, the person of the sovereign. In the practice of the Continental monarchical States which recognise *lèse-majesté* as a substantive offence, it includes much less serious crimes than acts known to English law as treason (*q.v.*).

**Lessons, Table of.**—See PRAYER-BOOK.

**Let.**—In a lease the word “let” has the same effect as the word “demise” (*Hart v. Windsor*, 1844, 13 L. J. Ex. 129, 135; *Mostyn v. West Mostyn Coal and Iron Co.*, 1876, 45 L. J. C. P. 401, 405).

“Let into possession,” see *Wheeler v. Tootel*, 1867, L. R. 3 Eq. 571.

“Let to be used for pasture,” see PASTURE.

**Letter-Missive**—The name given to the letter sent by the sovereign to the dean and chapter of a cathedral church, containing the name of the person he would have them elect as bishop. See BISHOP; CONGÉ D'ÉLIRE.

The term was also applied in the old Chancery practice to the letter sent to a peer, when defendant in a Chancery suit, by the Lord Chancellor, requesting him to appear. If the peer to whom a letter-missive was sent neglected to appear in obedience thereto, he might then be served with a *subpoena* (3 Black. Com. 445).

**Letter of Allotment**—A letter written by the secretary or other officer of a company, on behalf of the company, notifying to an applicant for shares in such company the fact that these have been allotted to him. Such a letter is the usual, although not the only, mode in which a company can accept the offer of an applicant for shares, but the acceptance, however communicated, must, as in other contracts, be unconditional. When sent by post, the acceptance is in the general case complete as soon as posted, although it may never have reached the applicant. A letter of allotment must bear a penny stamp. See COMPANY, vol. iii. p. 190.

**Letter of Credit.**—“A letter of credit (sometimes called a bill of credit (*q.v.*)) is an open letter of request, whereby one person (usually a merchant or a banker) requests some other person or persons to advance moneys or give credit to a third person named therein, for a certain amount, and promises that he will repay the same to the person advancing the same, or accept bills drawn upon himself, for the like amount. It is called a general letter of credit, when it is addressed to all merchants or other persons in general, requesting such advance to a third person; and it is called a special letter of credit, when it is addressed to a particular person by name, requesting him to make such advance to a third person” (Story, *Bills of*



*Exchange*, 4th ed., s. 459). The giver of such a letter undertakes that he will give credit, that he will pay, or that he will allow himself to be made a person upon whom demands or drafts may be made for payment. Such a letter is usually operated upon by bills of exchange, but it may also be operated upon by cheques or by simple demands, in any form, for the payment of the sums for which credit has been undertaken to be given (per Lord Cairns, L.C., in *Mogan v. Larivière*, 1875, L. R. 7 H. L. 432); but a letter opening a credit for a particular sum cannot of itself constitute an equitable assignment, or specific appropriation of that sum, so as to create a trust (*ibid.*). The grantee of a letter of credit is entitled to expect that his drafts will be honoured by the correspondent to whom the letter is addressed; if they are not so honoured, the grantee may recover in respect thereof from the grantor, and he is also entitled to be repaid any surplus remaining after payment of his drafts. A letter of credit is not a negotiable instrument. The person presenting it is not necessarily the person entitled to make the draft; therefore where bankers honoured a draft under it, which draft was in fact forged, they were held not discharged by such payment (*Orr v. Union Bank of Scotland*, 1854, 1 Macq. H. L. 513; see also *British Linen Co. v. Caledonian Insurance Co.*, 1861, 4 Macq. H. L. 107). Letters of credit, except those granted in the United Kingdom authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom, are liable to stamp duty (Stamp Act, 1891, s. 32 and Schedule). See CIRCULAR NOTE.

[*Authorities*.—Grant, *Law of Banking*, 5th ed., ch. xv., where all the cases on the subject are collected; and Thorburn, *Bills of Exchange*, Introd. pp. 8–22.]

**Letter of Request.**—See COMMISSIONS, ROGATORY; COMMISSION, EVIDENCE ON.

**Letterpress.**—See COPYRIGHT.

**Letters of Administration.**—See EXECUTORS AND ADMINISTRATORS; PROBATE.

**Letters of Credence.**—See DIPLOMATIC AGENTS.

**Letters of Marque.**—See PRIVATEERING.

**Letters of Safe Conduct.**—See SAFE CONDUCT.

**Letters Patent.**—The law relating to letters patent is best expounded in connection with the various rights which are conferred by them; letters patent, therefore, are dealt with under various heads in this *Encyclopædia*, and especially under PATENTS FOR INVENTIONS. In this place it is intended to state just a few of the main characteristics common to all letters patent. Letters patent are a means whereby the Crown makes a

## LETTERS PATENT

grant to a subject of some dignity, office, monopoly, franchise, etc.; the letters are addressed "to all to whom these presents shall come"; they are not sealed up, but are left open, and are recorded in the Patent Rolls, so that all subjects of the realm may read and be bound by their contents, hence the term letters "patent." They are of record (Coke, 4 *Inst.* 209); formerly they were always made under the Great Seal, but now by virtue of the Crown Office Act, 1877, and the Orders in Council made under it, the Wafer Great Seal may in many cases be used instead of the more cumbrous waxen seal, whilst letters patent for inventions—which form the bulk of letters patent—are sealed with the seal of the Patent Office (46 & 47 Vict. c. 57, s. 12). Amongst rights which are conferred by letters patent—other than monopolies for inventions—may be mentioned grants of peerages, judgeships of the High Court, the status of denizen, the rank of Queen's Counsel, grants of precedence at the Bar, the Attorney- or Solicitor-Generalship, the Treasury and Admiralty Commission, royal pardons, and many others (see Edmunds on *Patents*, 2nd ed., p. 1, note (c)).

The procedure by which letters patent, other than those for inventions, are obtained is as follows:—A warrant for the issue of letters is drawn up and is signed by the Lord Chancellor; this is submitted to the law officers of the Crown, who countersign it; finally, the warrant thus signed and countersigned is submitted to Her Majesty, who affixes her signature. The warrant is then sent to the Crown Office and is filed, after it has been acted upon by the issue of letters patent under the Great Seal or under the Wafer Great Seal, as required by law. The letters patent are delivered into the custody of those in whose favour they are granted; in many instances an entry is made in the Patent Rolls. The procedure for obtaining letters patent for inventions is stated *post*, under PATENTS FOR INVENTIONS.

The interpretation of letters patent is governed by rules which differ in material respects from those which obtain when the meaning of any other document of grant is in question. Usually a grant is construed in a manner favourable to the grantee. Letters patent are construed in the sense most favourable to the grantor, viz. the Crown; though if the Crown received consideration for the grant, or if the grant is expressed to have been made *ex certâ scientiâ et mero motu*, the severity of this rule is somewhat relaxed. And it is observable that a patent for an invention contains these words, "These our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee." Moreover, false recitals vitiate letters patent unless it be clear, notwithstanding the recital, that the grant carries out the intention of the Crown or that the recitals do not contain a false suggestion by the grantee, and that the Crown was not deceived by the grantee (see Bacon, *Abr.* "Prerog." F.; 2 Black. 347). In connection with this part of the subject it should be added that recitals in letters patent do not bind the Crown (*R. v. Bushopp*, 1600, Co. Rep. i. 40). If the intention of the Crown in making the grant be stated, and the grant contradicts such intention, the grant is void; such also is the case if the grant be contrary to law, or if it be uncertain.

The mode of bringing about the cancellation of illegal letters patent at the suit of a subject was by an action of *scire facias*, in the name of the Crown brought with the fiat of the Attorney-General, and such is even now the mode of procedure save where the letters patent attacked have been granted for an invention. The suit was usually brought in Chancery, but it could be brought in the King's Bench (Co. 4 *Inst.* 72, 80); and now pro-

ceedings can be taken (*semble*) in either the Chancery or the Queen's Bench Division of the High Court. Amongst the grounds on which letters patent may be repealed by way of *scire facias* may be mentioned: that the grant is illegal, or was made under a misapprehension, or was made in derogation of a former grant. To obtain the repeal of letters patent for inventions, the procedure laid down in sec. 26 of the Patent Act, 1883 (46 & 47 Vict. c. 97), must be followed. The practice in proceedings of *scire facias* may be found stated in Hindmarch, on *Patents*, pp. 387 *et seq.*; and see SCIRE FACIAS.

[*Authorities.*—Bacon, *Abr. "Prerog."* F.; Coke and Blackstone, the parts quoted above; notes to *Underhill v. Devereux*, 2 Wms. Saun. at p. 251, ed. 1871; Hindmarch on *Patents*; Edmunds on *Patents*, ed. 1897, chs. i., ix. ss. 2 and 3, and *Annotated Form of Letters Patent*, pp. 667 *et seq.* As to the repeal of letters patent, Edmunds on *Patents*, pp. 484 *et seq.*]

**Levant and Couchant**.—A term employed in connection with the subject of distress, and applied to cattle that have been sufficiently long on the land of another as to have lain down and risen up to feed, or, as it has usually been held, for at least a night and a day. Cattle which have strayed on to land in the occupation of a tenant may be distrained for rent in arrear by such tenant, this right being exercisable by the landlord only after the cattle have been levant and couchant, and after notice has been sent to their owner and he has neglected to drive them away, where they have strayed on to the land through defective or insufficient fences which the tenant or his landlord ought to repair. It appears that where the distress is by the grantee of a rent-charge or by the lord of the fee for an ancient rent, notice to the owner of the cattle is not necessary; the cattle must nevertheless be levant and couchant before being distrained in either of these cases. Where, however, the cattle have strayed on to the land through the neglect of their owner, or through defective fences where there is no obligation to repair the same, the landlord can exercise his right to distrain at once, that is, before the cattle have been levant and couchant (see Bullen, *Law of Distress*, pp. 103, 104). See DISTRESS.

The term is also used in connection with the subject of common of pasture. When so used it has been defined as meaning cattle "rising up and lying down on the land; that is, in fact, being upon the land by night and by day; and it denotes the number of animals which the land, to which the right of common belongs, can maintain by its winter eatage or produce—that is, during the season in which, the grass not growing, the right of common is of no benefit to the cattle" (Williams, *Rights of Common*, p. 31). But in *Carr v. Lambert* (1866, L. R. 1 Ex. 168) it was said that levancy and couchancy was rather the measure of the capacity of the land than a condition to be actually and literally complied with by the cattle lying down and getting up, or by their being fed off the land (see COMMON, vol. iii. p. 136; and Williams, *Commons*, ch. iii.).

**Levari facias**.—(Cause to be levied.) A writ of execution by which, under the old law, the sheriff was directed to seize the goods of a debtor and receive the profits of his lands till satisfaction should be made to the judgment creditor (3 Black. Com. 417). In practice this writ was superseded by the writ of *elegit* even in Blackstone's time; and it has now been expressly enacted that no writ of *levari facias* shall issue in any

civil proceeding (Bankruptcy Act, 1883, s. 146). It may still, however, issue in criminal matters, *e.g.* to levy a fine (if not already paid) imposed by justices where the conviction has been removed into the Queen's Bench Division and there affirmed (Short and Mellor, *Crown Office Practice*, 144, and Form No. 149, p. 653). See EXECUTION, vol. v. at p. 129.

**Levée en masse**—The calling upon of all able-bodied men to bear arms for the defence of their country. This *levée* converts every citizen into an active enemy (see WAR). The United States Instructions for the Government of Armies in the Field (1863) provides that: "If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorised levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war" (art. 51). See BELLIGERENT; COMBATANT; GUERRILLA.

**Level**.—Oral evidence is admissible to explain the meaning of this word as used in a mining lease, the word being capable of various meanings (*Clayton v. Gregson*, 1836, 5 Ad. & E. 302).

**Level Crossing**.—In the various railway Acts special provision has been made to provide for the safety of the public at points where a railway crosses a highway on the level. Railway companies are required to maintain gates at such level crossings, which are to be kept constantly closed against the highway, except when vehicles, etc., have to cross the railway, or unless the Board of Trade may otherwise determine; the gates must be so constructed as when closed to fence in the railway. Proper persons are also to be employed at level crossings to open and shut the gates, and a lodge is to be erected by the railway company thereat (2 & 3 Vict. c. 45, s. 1; Railway Regulation Act, 1842, s. 9; Railways Clauses Act, 1845, s. 47; and Railways Clauses Act, 1863, s. 6). These provisions, however, do not apply in the case of a private railway on private property, made and exclusively used for the proprietor's own purposes, and not for passenger traffic (*Matson v. Baird*, 1878, 3 App. Cas. 1082). Trains must slacken speed to four miles an hour at level crossings adjoining a station (Act of 1845, s. 48): and shunting is not to take place on such crossings (Act of 1863, s. 5). The Board of Trade may, if it appears to them necessary for the public safety, require a railway company to carry its line over a highway by means of a bridge instead of on the level (*ibid.* s. 7).

A railway company is bound to maintain the crossing in proper repair (*Oliver v. North-Eastern Rwy. Co.*, 1874, L. R. 9 Q. B. 409); and it is the duty of the company's servants to keep the gates closed when any train is approaching; if this duty is not carried out, and a person is injured in attempting to cross the line, this is evidence of negligence to go to the jury (*North-Eastern Rwy. Co. v. Wanless*, 1874, L. R. 7 H. L. 12).

Unreasonable and negligent delay in opening the gates at a level crossing whereby a person on the highway is detained, may render the railway company liable in damages (*Boyd v. Great Northern Rwy. Co.*, 1895, 2 Ir. R. 555).

[*Authority*.—Browne and Theobald, *Law of Railway Companies*, 2nd ed.]

**Levitical Degrees.**—See PROHIBITED DEGREES.

**Levy.**—This word in 29 Eliz. c. 4 (relating to sheriffs' poundage) means to "seize and thereby get the money" (per Bramwell, L.J., in *Mortimore v. Cragg*, 1878, 3 C. P. D. 219); "the word 'levy' in legal meaning is where goods are seized and money obtained by compulsion. If that is the meaning it does not necessarily comprise sale" (per Brett, L.J., *ibid.* 220). The sheriff is therefore entitled to his poundage where, after seizure of the debtor's goods, the debt is paid before sale (*ibid.*), or where the parties compromise before sale (*Alchin v. Wells*, 1793, 5 T. R. 470); he is also entitled to the same, although after sale the execution is set aside for irregularity (*Bullen v. Ansley*, 1806, 6 Esp. 111), *secus* where the execution is set aside before sale (*Miles v. Harris*, 1862, 31 L. J. C. P. 361).

In an action against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, an allegation in the declaration that the defendant took goods in execution, of the value of the moneys indorsed on the writ, "and then levied the same thereout," was held to import not only a seizure and a sale under the plaintiff's writ, but also that the sheriff had in his hands the proceeds of the sale (*Drewe v. Lainson*, 1840, 9 L. J. C. P. 69).

"Levied or collected," see *R. v. Robinson*, 1835, 4 L. J. Ex. 319.

**Levy War.**—See TREASON.

**Lex.**—In Roman law a "lex" was a law enacted by the *populus*, originally only in the *comitia curiata*, but at a later date in the *comitia centuriata* also (see *Inst.* i. 2, p. 4).

**Lex domicilii**—The law of the domicile. See DOMICILE; PRIVATE INTERNATIONAL LAW.

**Lex fori**—The law of the Forum. See PRIVATE INTERNATIONAL LAW.

**Lex loci celebrations.**—See PRIVATE INTERNATIONAL LAW.

**Lex loci contractus**—The law of the place where a contract is made. See PRIVATE INTERNATIONAL LAW.

**Lex loci rei sitæ**—The law of the place where a thing is situated. See PRIVATE INTERNATIONAL LAW.

**Lex loci solutionis**—The law of the place of payment or performance. See PRIVATE INTERNATIONAL LAW.

**Lex mercatoria.**—The *lex mercatoria*, or law merchant, is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the common law, afterwards becoming incorporated into it. Though part of the general law of England, it is distinguished by a separate name, because it applies to particular subjects principles more or less different from those which the common law recognises in other matters, and also because these principles were ingrafted into our own municipal system by gradual adoption from the *lex mercatoria*, or general body of European usages, in matters relating to commerce (Stephen's *Commentaries*, i. 62). There are three distinct stages in the history of the law merchant, the first ending in the time of Coke, in which it was a special kind of law administered in special Courts for the purpose of settling the disputes of a special class (mercantile men), subject to peculiar duties and possessed of peculiar rights. In its second stage, continuing till the time of Lord Mansfield, it was a body of customs to be proved in case of doubt as facts, and binding only on mercantile persons. During the third stage, namely, from the time of Lord Mansfield till the present day, it has been a collection of customs incorporated into the general law, and binding on all, merchants or not. The sources of the law merchant were: (a) *coutumiers* or collections of maritime usages and customs drawn up for the use of merchants and lawyers, such as the laws of Oleron and Wisbuy (see MARITIME LAW); (b) market law, which began with the great fairs in the Middle Ages, held at Champagne, Antwerp, Winchester, and other commercial cities to which merchants of all nations resorted, and was administered in staple Courts. There were also special Courts for the trial of mercantile cases in Italy, France, Spain, and Germany. Our own Admiralty Court administered mercantile law in early times, and the maritime law which it still administers as part of our municipal law is a branch of the *lex mercatoria*. Another source of the law merchant was the books of authority (mostly foreign) in the fourteenth and fifteenth centuries, and our own Malins and Molloy (Smith, *Mercantile Law* (1890), Introduction). The direct survivals of it in our law are the principle of non-survivorship in partnerships (*jus accrescendi inter mercatores locum non habet*), the right of suing on negotiable instruments (bills of exchange), and the right to trade marks.

[*Authority.*—See Smith, *Mercantile Law*.]

**Lex non scripta.**—Unwritten law, "comprising those principles, usages, and rules of conduct applicable to the government and security of person and property which do not depend upon any existing express and positive declaration of the will of the Legislature. It comprises and mainly consists of 'customs,' whether general or particular, and is often called the 'customary law'" (Broom, *Common Law*, 9th ed., p. 7).

**Lex scripta.**—Written law, that is the statute law of the land.

**Lex talionis.**—See WAGER OF LAW.

**Liability to Cease.**—These words in a charter-party mean, according to the cases, "not that the liability should cease to accrue, but

that the liability should cease to be enforced" (per Cleasby, B., in *Francesco v. Massey*, 1873, L. R. 8 Ex. 104; see also *Kish v. Cory*, 1875, L. R. 10 Q. B. 561).

**Libel.**—See DEFAMATION.

**Libel (Ecclesiastical).**—A libel (Lat. *libellus*, a little book) in a spiritual Court is the declaration or charge in writing by the plaintiff in a civil suit. When the defendant has appeared upon the citation, then the plaintiff must exhibit his libel. The Act 2 Hen. v. stat. 1, c. 3, provides for the prompt delivery of the libel to the defendant, whose pleading in answer is termed the allegation. Prohibition (*q.v.*) will go *quousque* on non-delivery of the libel (*Anon.*, 2 Anne, 2 Salk. 553; 2 Raym. (Ld.) 991). As to the proper form and contents of a libel, see Ayliffe, *Parergon*, 145; Burn, *Eccl. Law*, 9th ed., iii. 261; Phillimore, *Eccl. Law*, 2nd ed., ii. 990). The withdrawal of matters testamentary and matrimonial from ecclesiastical cognisance (see CONSISTORY COURT) has largely reduced the frequency of the civil suit.

**Libertatibus allocandis**—A writ which lay for a citizen or burgess impleaded contrary to his liberty, to have his privilege allowed (Tomlin, *Law Dict.*).

**Liberty.**—See FRANCHISE.

**Liberty of the Press.**—Every Englishman has the right to print and publish what he will, subject only to this, that he must take the consequences, should a jury subsequently deem his words defamatory. There is no longer any censorship of the press in this country. "The liberty of the press," says Lord Mansfield, in *R. v. Dean of St. Asaph*, 1784, 3 T. R. 431, *n.*, "consists in printing without any previous licence, subject to the consequences of law." Lord Ellenborough says, in *R. v. Cobbett*, 1804, 29 How. St. Tr. 49: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary licence necessary; but if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal." Lord Kenyon shortly puts it thus, in *R. v. Cuthell*, 1799, 27 How. St. Tr. 675: "A man may publish anything which twelve of his countrymen think is not blamable."

This was not always so in England. The printing press had not long been invented before statesmen began to fear its power. Nobles quailed before the sarcasms penned by low-born intellect; priests dreaded its searching questionings; while kings saw in it a new source of disaffection and danger. It undoubtedly increased to an enormous extent the power, for good or for evil, of every educated brain. Our English monarchs at first endeavoured to keep all the printing presses in their own hands, and allow no one to print anything except by special royal licence. All printing presses were kept under the immediate supervision of the King in Council, and regulated by proclamations and decrees of the Star Chamber

by virtue of the King's prerogative. In 1557 the Stationers Company of London was formed, and the exclusive privilege of printing and publishing in the English dominions was given to ninety-seven London stationers and their successors by regular apprenticeship. The company was also empowered to seize all publications printed by men who were not members of the guild. Later, by a decree of the Star Chamber in 1586, one printing press was allowed to each University. This Government monopoly of the "Art and Myserie of Printing" continued, in theory at all events, till 1637.

Queen Elizabeth, however, was not content with this exercise of the royal prerogative. In 1559 she determined to have all books read over by loyal bishops and privy councillors before they were allowed to go to the official press. In 1586 the Star Chamber enacted that all books should be read over in manuscript, and licensed by either the Archbishop of Canterbury or the Bishop of London. There was one exception. Law books were to be read and licensed by the Chief Justice of either Bench, or the Lord Chief Baron—a practice which continued down to the middle of the last century (see the prefaces to Burrows' and Douglas' Reports). Subsequently, the Master of the Revels usurped the right of revising poems and plays, and the Vice-Chancellors of the Universities were allowed, for convenience sake, to license books to be printed at the University presses.

But as the reading public increased in numbers it was found impossible to restrict the number of printing presses in the country. The Government therefore insisted all the more vehemently that no book should be published without a previous licence. By a decree of the Star Chamber, dated 11th July 1637, all printed books were required to be submitted to the licensers, and entered upon the registers of the Stationers Company, before they could be published; any printer who failed to do this was to be fined, and for ever disabled from exercising the art of printing, and his press and all copies of the unlicensed book forfeited to the Crown. The old word "*Imprimatur*" = "let it be printed," was still used, but in a new sense, to denote the consent of the licenser to the publication of a book.

After the abolition of the Star Chamber, the Long Parliament issued two orders, 9th March 1642 and 14th June 1643, very similar in effect to the decree of the Star Chamber mentioned above. Against these orders Milton published, on 24th November 1644, his noble but ineffectual protest, the *Areopagitica: a Speech for the Liberty of Unlicenc'd Printing*; a work written, as he tells us himself (Prose Works, ed. 1848, vol. i. 259), "in order to deliver the press from the restraints with which it was encumbered; that the power of determining what was true and what was false, what ought to be published and what to be suppressed, might no longer be entrusted to a few illiterate and illiberal individuals, who refused their sanction to any work which contained views or sentiments at all above the level of the vulgar superstition."

In spite of this masterpiece of argument, the order of 14th June 1643 remained in force under the Commonwealth. After the Restoration the Licensing Act was passed (13 & 14 Car. II. c. 33). It was based on the Star Chamber decree of 11th July 1637. This Act was to be in force for two years only (s. 25); but it was continued by the 16 Car. II. c. 8 till 1679, when it expired. It does not appear to have been then renewed; yet the censorship in fact continued throughout the remainder of the reign of Charles II. The first Parliament of James II., without debate, re-established the censorship on a legal basis by sec. 15 of the Statute 1 Jac. II. c. 17, which continued the Licensing Act of Charles II. for a period of eight years.



When this period ended in 1693 the matter was for the first time debated in Parliament; and the Licensing Act was renewed, but for two years only. In 1695 it was included in a general bill for the renewal of certain expiring statutes. The Commons struck it out of the list; the Lords reinstated it; the Commons struck it out again; and the Lords, without further struggle, accepted the amendment. And thus, says Macaulay (vol. iii. c. 19), "English literature was emancipated, and emancipated for ever, from the control of the Government." Yet no one realised at the time the vast importance of this salutary change.

Since that date (1695) every one is at liberty to write and publish what he pleases. But if he make a bad use of this liberty he must pay the penalty of his misconduct. If he unjustly attack an individual, the person defamed may sue for damages; if the words endanger the public peace or inculcate vice or sedition, the offender can be tried for a misdemeanour, either by information or indictment. Subject to these restrictions, the greatest latitude is allowed to all who write on public affairs. "The power of free discussion," as Lord Kenyon, C.J., said in *R. v. Reeves*, 1796, Peake, Add. C. 86; 4 R. R. 891, "is the right of every subject of this country." And this right is further safeguarded by Mr. Fox's Libel Act, passed in 1792, which re-established the rule that libel or no libel is a question for the jury and not for the judge. See FOX'S LIBEL ACT.

The only vestige remaining of the censorship of the press is the control of the Lord Chamberlain over plays. By the Theatres Regulation Act, 1843 (6 & 7 Vict. c. 68), ss. 12, 14, it is enacted that a copy of every new play, and of every alteration or amendment of an old play, shall be submitted to the Lord Chamberlain for the time being, who is empowered, whenever he shall be of opinion that it is fitting for the preservation of good manners, decorum, or of the public peace so to do, to forbid the acting or presenting any stage play, or any act, scene, or part thereof, or any prologue or epilogue, or any part thereof, anywhere in Great Britain, or in such theatres as he shall specify, and either absolutely or for such time as he shall think fit.

**Liberty of Working.**—In the Scotch appeal case of *Hamilton v. Dunlop*, 1885, 10 App. Cas. 813, it was held that where an owner conveys land to a singular successor or other person, reserving the "liberty of working the coal" in these lands, he must be taken to have reserved the estate of coal with which he stood vested by infetment at the date of conveyance, unless in the conveyance there are words which clearly cut down this right of property.

**Liberty to Apply.**—See APPLY, LIBERTY TO.

**Liberty to Call.**—See DEVIATION.

**Liberty to Hold Pleas.**—See FRANCHISE.

**Libraries.**—Under the Copyright Act, 1842, certain libraries are entitled to receive copies of all books and new editions containing altera-

## LIBRARIES

tions published after the commencement of the Act; these libraries are the British Museum (*q.v.*), the Bodleian Library at Oxford, the public library at Cambridge, the library of the Faculty of Advocates at Edinburgh, and the library of Trinity College, Dublin (s. 8). In the case of the four libraries other than the British Museum, a written demand on their behalf must be left with the publisher of each work desired, within twelve months next after the publication thereof, otherwise there is no obligation on publishers to deliver copies; if, however, a demand is made, the publisher is bound to deliver, within one month after such demand, to the Stationers Company for the use of the particular library, or, at his option, to the library itself, a copy of the book, on paper similar to that used for the largest number of copies of the work, in the like condition as the copies prepared for sale (*ibid.*). A penalty is imposed for failure to comply with such demands (s. 10). Under the former Copyright Acts certain other libraries had a similar right, but in their case the privilege was commuted for an annual money payment.

*Public Libraries Acts.*—The power of providing public libraries conferred by the various Public Libraries Acts has been largely taken advantage of, especially of late years. The first of these statutes, that of 1850, which was carried through Parliament mainly through the efforts of Mr. William Ewart, M.P., enabled town councils of boroughs having a population of not less than 10,000 to ascertain the opinions of the ratepayers as to the advisability of adopting the provisions of the Act, and, if the ratepayers were in favour of the Act being adopted, a rate limited to a halfpenny in the pound could be levied for the purpose of providing and maintaining a library. Further legislation on the subject followed, the whole of which was consolidated by the Public Libraries Act, 1892, the provisions of which, however, have been considerably modified by the Public Libraries (Amendment) Act, 1893, and the Local Government Act, 1894.

*Adoption of Act.*—The Act is adoptive; the method of adoption varying according to the character of the library district. The city of London, metropolitan districts (those mentioned in the Metropolis Management Acts), urban districts, and parishes outside urban districts are each constituted a "library district" (Act of 1892, s. 1, subs. 2, ss. 21, 22).

In the whole of the metropolis the Act can be adopted only if a majority of the voters (a "voter" being defined as a person registered as a county elector or enrolled as a burgess in respect of the occupation of property situate in the particular district or parish (s. 27)) express on the voting papers sent to them an opinion in favour of its adoption (s. 3, subs. 4), and this opinion of the voters can only be ascertained by the proper authority (which in the city of London is the Lord Mayor; in metropolitan districts, the district boards; and in metropolitan parishes, the vestries), on a requisition being made, in the city by the Common Council, in metropolitan districts and parishes by ten or more voters in this behalf (ss. 3, 21, 22).

In urban districts (an "urban district" includes a municipal borough) the method of adopting the Acts is by a resolution of the urban authority (Act of 1893, s. 2). Such a resolution can only be passed at a meeting of the urban authority after special notice of the meeting and of the intention to propose the resolution has been given, at least one month before the meeting, to every member of the authority. Such notice may be given to members in the mode in which notices to attend meetings are usually given, or where there is no such mode, the notice, signed by the clerk of the authority, may be sent to the usual or last known places of abode of the

members (s. 3). When a resolution adopting the Act has been passed, it must be notified by advertisement in one or more newspapers circulating in the district, and by notice affixed at church and chapel doors; a copy of the resolution must also be sent to the Local Government Board (s. 3). The resolution becomes operative on the date fixed by the authority, but such date must be not less than one month after the first publication of the advertisement of the resolution (*ibid.*).

In rural parishes the parish meeting has exclusively the power of adopting the Act (Local Government Act, 1894, s. 7), or, if a poll is demanded, by a poll of the parochial electors taken by ballot (*ibid.* Sched. I. Part 1, r. 7).

*Execution of Acts.*—The Act when adopted is carried into execution by the "library authority" of the district. In the city of London the library authority is the Common Council (Act of 1892, s. 21); in metropolitan districts and parishes commissioners are appointed for the purpose by the district boards or vestries (s. 22); unless such boards or vestries have obtained from the Local Government Board an order under sec. 33 of the Local Government Act, 1894, conferring upon them the powers of a parish council, in which case the district boards and vestries act themselves as library authorities. In urban districts the urban authority is the library authority (Act of 1892, s. 4); in rural parishes having a parish council such council, or a committee appointed by the same, is the library authority (Local Government Act, 1894, s. 7, subs. 7, and s. 56), and in the case of rural parishes not having a parish council, the parish meeting may appoint a committee of their own number, or commissioners, to act as the library authority (s. 19, subs. 3, 4). The library authority is empowered to provide and to manage all or any of the following institutions, viz. public libraries, public museums, schools for science, art galleries, and schools for art, and for that purpose to purchase and hire land, and erect, rebuild, alter, and repair buildings and suitably furnish same (Act of 1892, ss. 11, 15). Admission to a library or museum so provided is to be free (*ibid.* subs. 3). Power is given to library authorities to acquire and dispose of land under certain conditions (s. 12), and land held for ecclesiastical, parochial, or charitable purposes may, with the sanction of the proper authorities, be granted for the purposes of the Act, which land may be held by library authorities without any licence in mortmain (s. 13).

*Expenses of Execution of Act.*—The rate which may be levied for the purposes of the Act for any one financial year cannot exceed one penny in the pound (except in the city of London, or under special powers in local Acts), and the Act may be adopted with the proviso that the rate shall be limited to one halfpenny or three farthings in the pound, but these limitations may be subsequently removed (Act of 1892, ss. 2, 21, 29). The library expenses may, in the case of a municipal borough, be defrayed out of the borough fund or borough rate, or a separate rate may be levied; in urban districts, other than boroughs, out of the rate applicable to the general expenses incurred in the execution of the Public Health Acts, or a separate rate may be levied; in parishes, out of a rate to be raised with, and as part of, the poor rate, subject, however, to the qualification that persons assessed in respect of agricultural land, woodlands, market gardens, and nursery grounds are entitled to an allowance of two-thirds of the sum assessed upon them in respect of those lands for the purposes of the Act (s. 18). Borrowing powers are also conferred (s. 19). Authorities may combine for the purpose of carrying the Act into execution (s. 9; Act of 1892, s. 4).

A free public library established under the Act is a "literary institution" within the meaning of the Income Tax Act, 1842, s. 61, No. 6, and the building in which such library is placed is entitled to the exemption from duty specified in that section, provided the other conditions therein mentioned are fulfilled (*Manchester (Mayor) v. McAdam*, 1896, 65 L. J. Q. B. 672). To be so exempt the building must be *solely* used for the purposes of the free library (*Musgrave v. Dundee Magistrates*, 1897, 24 Ct. of Sess. Cas. 4th Series, 930).

**Licence.**—A licence is an excuse by reason of the consent of the plaintiff (or his predecessors in title, but see below, 5.) for an act which would otherwise be unlawful: as an entry upon the plaintiff's land, or the infringement of his patent or copyright (see the passage cited below, 3., and *Heap v. Hartley*, 1889, 42 Ch. D. 461). In the present article it is proposed to deal principally with licences relating to land or easements, but many of the rules cited have, as will appear, a general application.

1. *Creation of Licence.*—By the common law an easement, or a licence in the nature of an easement, could only be created by deed, *e.g.* the right to maintain a drain (*Cocker v. Cowper*, 1834, 1 C. M. & R. 418), or to work a patent, but in equity, where there was a contract of which SPECIFIC PERFORMANCE could be obtained (see EQUITY, and *M'Manus v. Cooke*, 1887, 35 Ch. D. 681), the absence of a deed, or of any writing, was not important (*Duke of Devonshire*, 1851, 14 Beav. 530; *Stewart v. Casey*, 1892, 9 R. P. C. 9,—an agreement for a licence to work a patent), and since the Judicature Acts the equitable rule prevails.

2. *When implied.*—A licence to enter upon land is not implied by the sale of goods which are stored upon the land (*Williams v. Morris*, 1841, 8 Mee. & W. 488), unless (*semble*) the person in possession is a party to the sale. Nor does the failure of a tenant to do repairs authorise his landlord to enter for the purpose (*Stocker v. Planet Building Society*, 1879, 27 W. R. 877). It is otherwise if the landlord and tenant have agreed that the former shall repair (*Saner v. Bilton*, 1878, 7 Ch. D. 815). The owner of goods may enter upon land to retake them if the person in possession of the land has wrongfully taken them there (*Patrick v. Colerick*, 1838, 3 Mee. & W. 483), but not merely because they are found there (*Anthony v. Haney*, 1832, 8 Bing. 187).

Similarly, a licence to make goods under a patent implies a licence to sell the goods made (*Thomas v. Hunt*, 1864, 17 C. B. N. S. 183), and a sale implies a licence to use patented goods, except in so far as the contract excludes the implication (see *Incandescent Gas Light Co. v. Cantels*, 1895, 12 R. P. C. 262).

3. *Revocation.*—A bare licence, that is to say, a licence not coupled with a grant, whether created by deed or parol, and whether for consideration or not is revocable. The material distinction is well shown by the following passage which has often been quoted with approval: "A dispensation or licence properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful, which, without licence, would have been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed for his own use, to cut down a tree in a man's grounds and to carry it away the next day after for his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away the deer killed and tree cut down, they are grants" (*Thomas v. Sorrell*, 1679, Vaugh. 351). It was formerly much debated whether an executed

licence could be revoked, but the rule, as above stated, was finally settled in *Wood v. Leadbitter* (1845, 13 Mee. & W. 838). Accordingly a visitor, who had purchased a ticket for the grand stand at Doncaster Races, was held to have been lawfully ejected, upon his refusal to leave, although no offer to return his entrance money was made (*l.c.*). But notice of the revocation must be given, and a reasonable time allowed to the licensee to quit, and also to remove any property which he has brought on to the land on the faith of the licence (*Mellor v. Watkiss*, 1874, L. R. 9 Q. B. 400). The licensee may recover damages for the breach of a contract to continue the licence for an agreed term (*Kerrison v. Smith*, [1897] 2 Q. B. 445).

The sale of goods with a licence to enter and take them away is an instance of a "licence coupled with a grant" (*Wood v. Manley*, 1839, 11 Ad. & E. 34; *Cornish v. Stubbs*, 1870, L. R. 5 C. P. 334).

A licence to erect permanent works, *e.g.* to build a house, which necessarily stops the enjoyment of an easement, when acted upon, operates to extinguish the easement (*Davies v. Marshall*, 1861, 10 C. B. N. S. 697; *Liggins v. Inges*, 1831, 7 Bing. 682).

Whether licences, other than licences relating to land, are revocable or not depends on the agreement of the parties, expressed, or to be inferred from the circumstances of the case. Thus the payment of a lump sum down by the licensee under a patent tends to show an intention that the licence should not be revocable at the will of the licensor (*Guyot v. Thompson*, [1894] 3 Ch. 388). The presumption in the absence of any proof or sufficient inference of a contrary agreement is that a licence is revocable at will (*l.c.*).

4. *Whether exclusive.*—Under the like conditions a licence is presumably not exclusive (*Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475).

5. *A Personal Privilege.*—A bare licence (above, 3.) is also presumed to be a mere personal privilege not assignable by the licensee (*Hill v. Tupper*, 1863, 2 H. & C. 121; *Bower v. Hedges*, 1853, 22 L. J. C. P. 194; *cp. Metcalfe v. Westaway*, 1864, 34 L. J. C. P. 113). Even if irrevocable as against the licensor it does not avail against his assignee, unless so created as to pass a legal interest (*Roffey v. Henderson*, 1851, 17 Q. B. 574—licence by landlord to re-enter and sever tenant's fixtures after the term, not available against new tenant; *Richards v. Harper*, 1866, L. R. 1 Ex. 199), but if it passed an equitable interest, created for value, it would now be binding upon a volunteer or a purchaser with notice claiming under the licensor.

A licence to enter and do some act implies a licence to take all necessary assistants for the purpose (*Dennett v. Grover*, 1740, Willes, 195).

It confers no right upon the licensee to sue third parties, in respect of interference with the subject of it, in his own name (*Hill v. Tupper*, *supra*; *Heap v. Hartley*, 1889, 42 Ch. D. 461). Of course, if he have possession of land or goods affected by a trespass, he can exercise his possessory remedies (*Northam v. Bowden*, 1855, 24 L. J. Ex. 237).

6. *For Act contrary to Law.*—A licence to enter by force is void, as forcible entries are criminal under the Statute 2 Rich. II. (*Edwick v. Hawkes*, 1881, 18 Ch. D. 199; *cp. Beddall v. Maitland*, 1881, 17 Ch. D. 174).

7. *Trespass ab initio.*—If the licensee under a licence to enter conferred by law, *e.g.* in carrying out an execution or (at the common law) a distress, abuses his authority, he becomes a trespasser *ab initio* (see the *Six Carpenters'* case, 8 Co. Rep. 146 *a*, in 1 Smith's *Leading Cases*, and *TRESPASS*).

8. *Responsibility for Negligence.*—A licensee who enters by the permission, but not at the request, of the person in possession, must take the land upon which he enters as he finds it (*Gautret v. Egerton*, 1867, L. R. 2 C. P. 371; *cp. Lane v. Fox*, [1897] 1 Q. B. 415), but if he enters by invitation, as

a customer in a shop (*Chapman v. Rothwell*, 1858, El. B. & E. 168), the invitee owes a duty to him not to negligently allow the land to be in a condition dangerous to him.

See COPYRIGHT; EXCISE (as to the Licensing Acts); LANDLORD AND TENANT (as to licence to assign); and PATENTS.

[*Authority*.—Gale on *Easements*.]

**Licence (Marriage).**—There are three kinds of marriage licence, namely—(1) the *Common Licence* of the Ordinary; (2) the *Special Licence* of the Archbishop of Canterbury; and (3) the *Superintendent Registrar's Licence*.

(1) *Common Licence*.—As has been already observed, *sub tit.* BANNS OF MARRIAGE, banns are the normal preliminary to marriage, both by canon law and by statute. The common licence is a canonical dispensation by virtue of which marriage is permitted to be solemnised without the publication of banns, and can only be granted by a person having episcopal authority. Such dispensations have indubitably been granted in England since the thirteenth century. The Act 25 Hen. VIII. c. 21, which to this day regulates the issue of special licences, reserves to the bishops dispensing power "in all cases in which they were wont to dispense by common law or custom of the realm." The Canons of 1603 (101 *et seq.*), as altered in 1888, regulate the issue of common licences, and their provisions are still in force except in so far as they may be held to be superseded or modified by legislation (see ECCLESIASTICAL LAW). The Marriage Act, 1823 (4 Geo. IV. c. 76), now embodies the statute law on the subject. The question has lately been raised, or rather revived, whether the Ordinary is bound *ex debito justitiæ* to grant a common licence to a marriageable person, or whether such licence is not (as its language implies) purely a matter of grace and favour. This question is no new one. In 1760, *i.e.* shortly after the passing of the first Marriage Act, 26 Geo. II. c. 33 (commonly called Lord Hardwicke's Act), in 1753, a case for opinion on this very point was laid before Sir Charles Pratt, A.-G. (afterwards Lord Camden, C.). The case and opinion are printed in Forsyth's *Cases and Opinions on Constitutional Law*, 1869, p. 479, as follows:—

[CASE.]

If application is made to an ecclesiastical judge, duly authorised to grant marriage licences, for a licence to solemnise a marriage between parties of full age, and free condition, who reside within his jurisdiction, and have complied with every requisite prescribed by the Act for the better preventing clandestine marriages and with all the forms prescribed by the Canons—is the judge compellable to grant such licence as of matter of right, or is it a matter of favour which of his own free will he arbitrarily can refuse; or has the subject a right to a *mandamus*, or any other and what remedy?

[OPINION.]

I am of opinion that the licence is not a matter of right, but favour only, and may be refused by the ecclesiastical judge; for it is a power lodged with the ordinary and metropolitan for their advantage only, to dispense with the forms required by the rubric, whereby the marriage, as well as by the canonical law, ought to be publicly celebrated after a due publication of banns. Therefore neither the party nor the public can be interested in the refusal, because the proper and truly legal method is left free, *viz.* to marry by banns.

C. PRATT.

February 5, 1760.

In the *Prince of Capua's* case, 1836, 30 L. J. P. M. & A. 71 (note to *Bevan v. M'Mahon*), Sir John Nicholl, Master of the Faculties, after argument, acted on this view of the law, and refused the licence. The parties were afterwards married by banns (see *Annual Register*, 1836, *Chronicle*, p. 62). It would therefore appear that certain "statements of the law," in a

directly contrary sense, made in 1895 by the present learned Chancellor of London (it is difficult to see how they were judgments of the Consistory Court), and reported alone in 11 T. L. R. 387, 388, 496, must (if correctly reported) be read with caution.

Concurrently with the bishop of the diocese, and not by way of appeal, the Archbishop of Canterbury, as Metropolitan, claims and exercises an original right of granting common licences throughout the Southern Province. These licences must be distinguished from the special licences hereafter mentioned. It does not appear that any such concurrent right has been claimed by Archbishops of York over the Northern Province; even if subsisting in theory, the right is practically in abeyance.

The common licence is usually granted in the name and under the seal of the Chancellor of the diocese, acting in his capacity of Vicar-General (see CONSISTORY COURT). In most of the Chancellors' patents the power is expressly delegated. It depends on the terms of the patent, whether the appointment of a surrogate (*q.v.*) rests with the Chancellor, or remains with the bishop. But it is conceived that, whatever the terms of the patent, the bishop is responsible for the acts of his officers, whether acting judicially (*Prebend. of Hatcherlie's case*, Noy, 153) or *a fortiori* ministerially. The effect of the common licence is to put the parties and the officiating clergyman into the same position as if banns had been duly published and no effective impediment alleged. A marriage by licence requires to be solemnised with exactly the same formalities as a marriage after banns, including the final invitation to allege an impediment. The licence is, however, in the absence of fraud, a legal authority to the clergyman to solemnise the marriage (*Argar v. Holdsworth*, 1758, 2 Lee, 515); and *semble*, conclusive on the question of due residence (*Tuckness v. Alexander*, 1863, 2 Drew. & Sm. 614). A marriage by licence, in which the parties are wrongly named or described, is not invalid (*Ewing v. Wheatley*, 1814, 2 Hag. Con. 175; *Bevan v. M'Mahon*, 1861, 30 L. J. P. M. & A. 61). See NULLITY OF MARRIAGE.

(2) *Special Licence*.—Previously to the passing of the Act 25 Hen. VIII. c. 21, the Archbishop of Canterbury, as *legatus natus* of the Pope, claimed and exercised the right to grant various faculties and dispensations, including a licence to be married not only without banns, but at any time, and in any place in England irrespective of the usual canonical requirements. When the English Church asserted her independence of the See of Rome, the "Act concerning Peter-pence and Dispensations" (25 Hen. VIII. c. 21) was passed, which continued to the Archbishop of Canterbury, in right of his See, the power previously exercised by him as papal legate. Sec. 4 enacts "that the said archbishop and his successors after good and due examination by them had of the causes and qualities of the persons procuring for licences," etc., "shall have full power and authority by themselves or by their sufficient and substantial commissary or deputy [now known as the Master of the Faculties] to grant and dispose by an instrument under the name and seal of the said archbishop . . . all manner of licences, etc., for any such cause or matter whereof heretofore such licences, etc., have been accustomed to be had at the See of Rome or by the authority thereof or of any prelate of this realm." Sec. 16 provides that during a vacancy in the See of Canterbury, such licences, etc., shall be granted under the name and seal of the guardian of the spiritualities of the said archbishopric for the time being: namely, the Dean and Chapter of Canterbury (see DEAN AND CHAPTER). Sec. 17 provides that if the archbishop or guardian of the spiritualities refuse to grant any licences, etc., "to any person or persons that ought, upon a good, just, and reasonable cause, to have the same" (words clearly implying a

discretion somewhere), there may be an appeal to the Lord Chancellor or Lord Keeper; and ultimately the licence, if refused "without just and reasonable cause," may be granted by "two spiritual prelates or persons" to be commissioned under the Great Seal. This last provision, occurring in one of a series of Acts which pressed the Royal Supremacy to its extreme limits, is a distinct admission that in the very last resort the dispensing power rests with the spirituality. The Archbishop of Canterbury's right to grant "special licences to marry at any convenient time or place," is expressly saved by the Marriage Acts, 1823 (s. 20) and 1836 (s. 1). In practice these licences are somewhat sparingly issued, and are restricted to persons of high rank, except in very urgent cases. By the operation of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 7, the judge of the Provincial Courts of Canterbury and York appointed under and for the purposes of that Act has become *ex officio* Master of the Faculties to the Archbishop of Canterbury (see ARCHES, COURT OF).

(3) *Superintendent Registrar's Licence*.—Under the Marriage Act, 1836 (6 & 7 Will. IV. c. 85), as amended by the Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), a superintendent registrar has authority to grant a licence for marriage in the form set forth in Sched. (C) to the latter Act; but no such marriage (s. 11) shall be solemnised in any registered building (see NONCONFORMIST; ROMAN CATHOLIC) without certain specified consents, nor in any church or chapel of the Church of England without the consent of the minister thereof, nor, in such latter case, by any other than a duly qualified clergyman of the said church, or with any other forms and ceremonies than those of the said church. Unlike common and special licences, the grant of this licence seems to be obligatory on the superintendent registrar, where the statutory preliminaries are complied with, and no lawful impediment is shown (s. 9). See MARRIAGE.

**Licensed House.**—See ASYLUMS, vol. i. p. 385.

**Licensed Victualler.**—See LICENSING.

## Licensing; Licensing Acts.

### TABLE OF CONTENTS.

I. LICENCES	386	2. Where exercised	395
1. Not requiring Justices' Certificate	386	(1) The General Annual Licensing Meeting	395
2. Requiring Justices' Certificate	389	(2) The Transfer or Special Sessions	398
3. Occasional Licences	391	(3) Petty Sessions	398
4. Six-day Licences	392	(4) The Confirming Authority	398
5. Early-closing Licences	392	(a) In Counties	398
II. THE LICENSING JURISDICTION	392	(b) In Boroughs	399
1. How exercised—The Licensing Justices	392	III. LICENSING APPLICATIONS	399
(1) In Counties	393	1. New Licences	399
(2) In Boroughs	393	2. Renewals	400
(3) Discretion of Justices	394	3. Transfers	401
(i.) Absolute	394	4. Temporary Transfers	403
(ii.) Limited	394	5. Removals	403
(4) Disqualifications of Justices	395	6. Provisional Licences	404



IV. LICENSING APPEALS	404	VII. OFFENCES	410
V. CLOSING HOURS	406	1. Offences by Licensed Persons	410
VI. DISQUALIFICATIONS	408	2. Offences by Persons other than Licensed Persons	416
1. Persons	408		
2. Premises	408		

## I. LICENCES.

"Licence" means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828 (now called the Alehouse Act, 1828; see 55 Vict. c. 10), including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets which is hereby authorised to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the justices in pursuance of this Act (Licensing Act, 1872, s. 74).

No person may sell intoxicating liquors without taking out an excise licence and paying certain fees for the privilege to the Government. Prior to 1828 an excise licence alone was necessary, but by the Alehouse Act, 1828 (9 Geo. IV. c. 61), a justices' licence, therein called a "certificate," was made a condition precedent to the grant of the excise licence in almost all cases. The term "certificate" aptly distinguishes the licence granted by the justices from the excise licence, and it is to be regretted that the word "licence" has been substituted for it in the above definition, and by common usage. The term has been retained in this article where its convenience is obvious.

The Alehouse Act, 1828, applied only to inns, alehouses, and victualling houses, but it has been extended to all other houses selling intoxicating liquors by the Wine and Beerhouse Act, 1869 (32 & 33 Vict. 27), ss. 5 and 8; by the Wine and Beerhouse Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 4; and by the Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 68 and 74.

The effect of these Acts has been to divide licences into two classes—(a) those not affected by these Acts (in this respect), and therefore not requiring a justices' certificate; (b) those which may not be granted by the excise authorities without the production of such a certificate. We shall therefore distribute all licences under these two heads.

Certificates remain in force in the counties of Middlesex, Surrey and London, from the 5th day of April, and elsewhere from the 10th day of October, after the granting thereof, for one whole year thence respectively next ensuing, and no longer (9 Geo. IV. c. 61, s. 13; 33 & 34 Vict. c. 29, s. 4, subs. 5). Of course this does not apply to occasional and temporary licences.

A justices' licence must be produced on demand by a justice of the peace, constable, or officer of Inland Revenue, on pain of a penalty not exceeding £10 (L. A. 1872, s. 64). And any summons against a licence-holder for offences under the Licensing Act, 1872, in cases where that Act requires a conviction to be recorded on the licence, must state that the production of the licence will be required (L. A. 1872, s. 55). Where by any conviction the licence is forfeited, or the holder or premises disqualified, the licence is to be retained by the clerk of the Court and notice sent by him to the district licensing officer and to the clerk to the licensing justices (L. A. 1872, s. 55). Where a licence has been lost or mislaid, or on application for a grant or transfer, has been wilfully withheld by the owner, a copy of the licence may be indorsed and considered valid (5 & 6 Vict. c. 44, s. 2; L. A. 1872, s. 41; 47 & 58 Vict. c. 29).

**1. Licences not requiring a Justices' Certificate.**—(1) *For the*

*Sale of Intoxicating Liquor by Wholesale.*—These licences are expressly exempted from the provisions of the Licensing Act, 1872, by sec. 72, even as to selling within prohibited hours (*R. v. Jenkins*, 1891, 55 J. P. 824; 61 L. J. M. C. 57; 65 L. T. 857; 40 W. R. 318; 8 T. L. R. 163). They are of three kinds—

(a) *Dealer's off-licence for the sale of strong beer.*—This is granted under sec. 2 of 6 Geo. IV. c. 81, to any person, not being a brewer of beer, who shall sell strong beer only in casks containing not less than four and a half imperial gallons, or in not less than two dozen reputed quart bottles at one time to be consumed off the premises.

A sale of a less quantity at one time is a selling by retail (Beerhouse Act, 1834, s. 19).

It is immaterial that the liquor is sold in small vessels, such as pints and half-pints, provided the quantity sold at one time be not less than two dozen reputed quarts (*Fairclough v. Roberts*, 1890, 24 Q. B. D. 350; 54 J. P. 421; 59 L. J. M. C. 54; 62 L. T. 700; 38 W. R. 330; 6 T. L. R. 180).

(b) *Spirit dealer's licence.*—This allows the sale of not less than two gallons of spirits of the same denomination at one time to the same person (6 Geo. IV. c. 81, s. 2, "Spirits"; 43 & 44 Vict. c. 24, s. 102). "Spirits" is defined as fermented liquor containing more than 40 per cent. of proof spirit (23 Vict. c. 27, s. 21; but see 43 & 44 Vict. c. 24, s. 3).

(c) *Sweet dealer's licence.*—This is granted for the sale of "any kind of sweets or made wines, or mead, or metheglin, in any quantity amounting to two gallons or upwards or in one dozen or more reputed quart bottles at one time" (23 & 24 Vict. c. 113, ss. 1 and 7). The principle in *Fairclough v. Roberts* (*supra*) appears applicable to this licence.

(2) *For the Sale of Intoxicating Liquor by Retail.*—Of the following licences, (a) and (b) are expressly excepted from the requirement of a justices' certificate by sec. 73 of the Licensing Act, 1872; but are subject to the rules as to closing hours, and probably to all the other provisions of the Licensing Acts (*Martin v. Barker*, 1881, 50 L. J. M. C. 109; 45 J. P. 749; 45 L. T. 214; 29 W. R. 789).

The licences (c), (d), (e), (f), (g), and (h) are altogether excepted from the provisions of the Licensing Act, 1872, by sec. 72, and so appear to fall within the *ratio decidendi* of *R. v. Jenkins* (*supra*).

(a) *Dealer's Foreign Wine Licence.*—This enables the sale of wine by retail, not to be consumed on the premises, by a wine merchant in pursuance of a wine dealer's excise licence. This excise licence is granted under 6 Geo. IV. c. 81, s. 2, "Wines," and enables the holder to sell either by wholesale or retail. This licence must be distinguished from the retail licence under 23 Vict. c. 27, s. 3, which requires a justices' certificate by 32 & 33 Vict. c. 27, s. 4 (*Palmer v. Thatcher*, 1878, 3 Q. B. D. 346; 42 J. P. 213; 47 L. J. M. C. 54; 37 L. T. 84; 26 W. R. 314). This licence covers the sale of all foreign wines, and includes any kind of sweets or made wines, or mead or metheglin (38 & 39 Vict. c. 23, s. 9).

(b) *Spirit Dealer's Additional Retail off-Licence.*—This enables the sale of liqueurs or spirits by retail, not to be consumed on the premises, by a wholesale spirit dealer whose premises are exclusively used for the sale of intoxicating liquors, in pursuance of a retail excise licence granted under 24 & 25 Vict. c. 21. If the premises are used for any other purpose, or communicate with the premises of, or are occupied by a person carrying on any other trade or business, a justices' certificate is necessary. (L. A. 1872, s. 68).

This additional retail licence authorises the dealer to sell by retail

foreign or British wines in any quantity not less than one reputed quart bottle, or as to foreign liqueurs in the bottles in which they are imported.

(c) *Spirit Dealer's Additional Retail Liqueur Licence*.—Any person entitled to take out the last licence may take out this licence authorising the sale by retail of any quantity, not being less than one reputed quart bottle, or in the bottles in which they have been imported, of foreign liqueurs, not to be consumed on the premises (11 & 12 Vict. c. 121, s. 9; L. A. 1872, s. 68).

(d) The sale of spruce or black beer.

(e) The sale of intoxicating liquor by proprietors of theatres, in pursuance of the Acts on that behalf. For the licensing of theatres, see *THEATRE, post*. The theatre being duly licensed for stage-plays, the excise authorities may grant an excise licence for the sale of beer, spirits, and wine, in such theatre (5 & 6 Will. iv. c. 39, s. 7). The Commissioners of Excise have no power to grant this licence to the proprietors of a place licensed for music and dancing, but not for stage-plays, though it be called a theatre, without a justices' certificate (*R. v. Commissioners of Inland Revenue*, 1888, 21 Q. B. D. 569; 52 J. P. 390; 57 L. J. M. C. 92; 59 L. T. 378; 36 W. R. 696). The bar of a theatre cannot be kept open beyond the closing hours of the place in which the theatre is situated (*Gallagher v. Rudd*, [1897] 1 Q. B. 114; 62 J. P. 789).

(f) The sale of intoxicating liquor in packets boats, in pursuance of the Acts in that behalf.

The master or commander of vessels and packets may be licensed annually by the Commissioners or authorised Officers of Excise to retail wine, foreign wine, beer, cider, perry, spirituous liquors, and tobacco, to the passengers, to be consumed on board, without the production of a justices' certificate (9 Geo. iv. c. 47; 4 & 5 Will. iv. c. 75; 5 & 6 Vict. c. 44, s. 5; 43 & 44 Vict. c. 20, s. 45; 53 & 54 Vict. c. 33).

No exciseable liquors must be sold on board any boats or vessels moored or lying at anchor within the metropolitan police district during prohibited hours (5 & 6 Vict. c. 44, s. 5).

(g) The sale of intoxicating liquors on *special occasions* (*Occasional Licences, infra*).

(h) The sale of medicated or methylated spirits (24 & 25 Vict. c. 91; 30 & 31 Vict. c. 90, s. 18; 43 & 44 Vict. c. 24, Pt. ii.; 53 & 54 Vict. c. 8, Pt. v.), or spirits made up in medicine and sold by doctors or chemists (16 Geo. II. c. 8, s. 12).

(3) *For the Keeping of a Refreshment House*.—"All houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment at any time between the hours of nine (now "ten" by 24 & 25 Vict. c. 91, s. 8) of the clock at night and five of the clock on the following morning, not being licensed for the sale of beer, cider, wine, or spirits respectively, shall be deemed refreshment houses within this Act, and the resident owner, tenant, or occupier thereof shall be required to take out a licence under this Act to keep a refreshment house" (23 & 24 Vict. c. 27, s. 6). And any person "who shall keep any house, room, shop, or building for the purpose of selling therein any victual or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine, and spirits sold respectively under a proper licence in that behalf), and every person who shall keep any house, room, shop, or building for the consumption therein, by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a licence under this Act to keep a refreshment house."

Any person holding this excise licence may obtain an occasional licence to carry on such business at any place, other than that for which he is licensed, for any time not exceeding three consecutive days at one time specified in such licence (27 & 28 Vict. c. 18, s. 5).

The mere sending out for refreshments for persons on the premises without profit to the proprietor does not constitute such premises a refreshment house (*Taylor v. Oram*, 1862, 1 H. & C. 370; 31 L. J. M. C. 252; 27 J. P. 8; 7 L. T. 58; 10 W. R. 800); but a temperance hotel supplying refreshments after 10 p.m. to persons not being visitors is a refreshment house (*Kelleway v. Macdougall*, 1881, 45 J. P. 207). The question of what is a refreshment house must always depend on the facts in each case (*Muir v. Keay*, 1875, L. R. 10 Q. B. 599; 44 L. J. M. C. 143; 23 W. R. 700; 40 J. P. 694; and see *Hovcs v. Inland Revenue*, 1876, 1 Ex. D. 385; 46 L. J. M. C. 15; 41 J. P. 423; 35 L. T. 584; 24 W. R. 897). A licensed refreshment house keeper not holding a wine licence must not sell on a Sunday (*Duffell v. Curtis*, 1877, 35 L. T. 853).

It is expressly provided (L. A. 1872, s. 72) that nothing in the Licensing Act, 1872, is to affect or apply to the privileges enjoyed by the mayor or burgesses of the borough of St. Alban's (see also 23 Vict. c. 27, s. 45; 32 & 33 Vict. c. 27, s. 20), or the exemption from the obligation to take out either a justices' or an excise licence enjoyed by the Vintners' Company of the City of London (see also 9 Geo. IV. c. 61, s. 36; 1 Will. IV. c. 64, s. 29; 3 & 4 Vict. c. 61, s. 22; 32 & 33 Vict. c. 27, s. 20).

The universities are also exempted from the ordinary licensing laws in many respects (see 9 Geo. IV. c. 61, s. 36; 5 & 6 Vict. c. 44, s. 6; 1 Will. IV. c. 64, s. 29; 3 & 4 Vict. c. 61, s. 22; 23 Vict. c. 27, s. 45; 32 & 33 Vict. c. 27, s. 20; *R. v. Archdall*, 1838, 8 Ad. & E. 281).

**2. Licences requiring a Justices' Certificate.**—The following retail licences can be granted by the excise authorities only on production of a justices' certificate.

The certificate will cover as many excise licences as may be specified in such certificate (L. A. 1874, s. 23).

An excise licence granted in pursuance of a justices' certificate becomes void if such certificate be forfeited or become void (L. A. 1872, s. 63; L. A. 1874, s. 1). But where there is an appeal against a refusal of the justices to renew, and the licence expires before the appeal is determined, the Commissioners of Inland Revenue may by order permit the business to be carried on pending the appeal on such conditions as they think just. They have no power, however, to grant an order where there has been a refusal of a transfer. When a licence is forfeited on conviction for an offence, which is appealed against, the Court convicting may by order grant a temporary licence to be in force during the pendency of the appeal, upon such conditions as they think just (L. A. 1872, s. 53; cp. *R. v. Kearns and Other JJ.*, 1896, 60 J. P. 139).

(1) *Innkeeper's on-Licence.*—This is a licence for the sale of spirits (6 Geo. IV. c. 81, s. 2), including beer and wine (43 & 44 Vict. c. 20, s. 43 (2)), to be consumed on or off the premises only which are specified in the certificate. It is the widest certificate that can be granted, and enables the holder to take out any excise licence for which a certificate is necessary (*R. v. Sylvester*, 1862, 2 B. & S. 322; 31 L. J. M. C. 93; 5 L. T. 794; 8 Jur. N. S. 484; 26 J. P. 151). The certificate can only be granted "to persons keeping or about to keep inns, alehouses, and victualling houses" (Alehouse Act, 1828, s. 1), which are defined as "all houses in which shall be sold by retail any exciseable liquor, to be drunk or consumed on the premises"; and

"exciseable liquor" includes "any ale, beer, or other fermented malt liquor, sweets, cider, perry, wine, or other spirituous liquors which now is or hereafter may be charged with duty, either by customs or excise" (*ibid.* s. 37).

(2) *Beer or Cider Licence, on or off.*—The beer licence permits the sale of beer, ale, porter, cider, and perry; the cider licence permits the sale of cider and perry. These licences may be either for consumption on and off, or only off the licensed premises (1 Will. IV. c. 64, ss. 2, 30; 32 & 33 Vict. c. 27, ss. 4, 5). The grant of these licences is subject to qualifications as to residence and valuation of the premises (see p. 409).

(3) *Beer Dealer's additional off-Licence.*—Any person holding a "dealer's off-licence for the sale of strong beer" (see *supra*) may obtain a certificate from the justices enabling him to take out an excise licence for the sale of beer by retail to be consumed off the premises (26 & 27 Vict. c. 33, s. 1; 32 & 33 Vict. c. 27, ss. 4, 5; L. A. 1872, s. 3).

(4) *Table-Beer off-Licence.*—Any person may "take out a licence for the sale in any house or shop of table-beer, at a price not exceeding the rate of one penny halfpenny the quart, and not to be drunk or consumed on the premises where sold" (24 & 25 Vict. c. 21, s. 3; 32 & 33 Vict. c. 27, ss. 4, 5).

(5) *Foreign Wine Licences.*—These are of two kinds—(a) on, and (b) off. A licence to dealers or retailers of foreign wine includes sweets (38 Vict. c. 23, s. 9).

All liquor sold or offered for sale by any person as being foreign wine, or under the name by which any foreign wine is usually designated or known, is, as against the seller, to be deemed to be foreign wine (23 Vict. c. 27, s. 21). Wine sold as "Best Pale Sherry, British," requires a foreign wine licence, as "best pale sherry is a foreign wine, and the character is not taken away from it by putting the word 'British' underneath it" (*Richards v. Banks*, 1888, 58 L. T. 634; 52 J. P. 23).

(a) *The on-Licence, or Refreshment House Wine Licence.*—"Every person who shall be licensed to keep a refreshment house, and shall pursue therein the trade or business of a confectioner, or shall keep open such house as an eating-house, for the purpose of selling, to be consumed therein, animal food or other victuals wherewith pure wine or other fermented liquors are usually drunk, shall be entitled (subject to the terms and conditions of this Act, and not being expressly disqualified thereby) to take out a licence to sell foreign wine by retail in such refreshment house, to be consumed on the premises where the same shall have been sold" (23 Vict. c. 27, s. 7). The premises must be of a certain rent or annual value (see p. 409).

"Every sale of foreign wine in any less quantity than two gallons, or in any less than one dozen reputed quart bottles, at one time," is a sale by retail (23 Vict. c. 27; see *Fairclough v. Roberts*, p. 387).

For the definition of refreshment house, see *Licences not requiring a Justices' Certificate*, No. 3 (*supra*, p. 388).

(b) *The off-Licence.*—Any person (a) who keeps a shop for the sale of any goods or commodities other than foreign wine, or (b) holds a licence as a dealer in wine, may take out a licence to sell by retail, and in reputed quart or pint bottles only, in such shop, foreign wine not to be consumed on the premises. This licence includes the sale of any kind of sweets, or made wines, or mead, or metheglin in any quantity (38 & 39 Vict. c. 23, s. 9).

A person holding the "dealer's foreign wine licence" (*supra*) may sell by retail, and in any quantity; but such person may prefer to take out this licence, which costs less, though it requires the justices' certificate, and

authorises selling in reputed quart or pint bottles only (*Palmer v. Thatcher*, p. 387, *supra*).

The justices can only refuse this certificate on one of certain grounds (see p. 394).

Strong beer sold under a wholesale dealer's licence is within the meaning of "goods or commodities other than foreign wine" (*R. v. Bishop*, 1886, 50 J. P. 167).

(6) *Sweets Licences*.—These authorise the sale of sweets only, and may be granted in the same manner and subject to the same conditions as if sweets were wine (see *Foreign Wine Licences* (a) and (b)).

(7) *Spirit Dealer's additional off-Licence*.—This licence is granted only to the holder of a "spirit dealer's licence" under 6 Geo. IV. c. 81, s. 2, and is necessary only where the premises do not comply with the requirements of the Licensing Act, 1872, s. 68 (see *Spirit Dealer's additional Retail off-Licence, not requiring a Justices' Certificate*, p. 387). It is granted only to the holder of a spirit dealer's excise licence, "in the same manner in all respects in which a licence for selling wine not to be consumed on the premises may by law be granted." The justices can only refuse this certificate on one of certain grounds (L. A. 1872, ss. 68, 69, and see p. 394).

"The holder of this licence may sell foreign or British spirits in any quantity not less than one reputed quart bottle, or, as to foreign liqueurs, in the bottles in which the same may have been imported" (24 & 25 Vict. c. 21, s. 2).

(8) *Spirit Dealer's additional Liqueur off-Licence* (see (c) under the *Retail Licences not requiring Certificate*, p. 388).—The justices' certificate is only necessary under the circumstances rendering the certificate necessary in the last licence (L. A. 1872, ss. 68, 69, 73).

**3. Occasional Licences.**—"Occasional licence" means a licence to sell beer, spirits, or wine, granted in pursuance of 25 & 26 Vict. c. 22, s. 13, and 27 Vict. c. 18, s. 5, and the Acts amending the same in relation to the licences therein mentioned, or any of such Acts (L. A. 1874, s. 32). These licences are of two kinds:—

(1) To sell at places other than the licensed premises. The excise authorities may grant any person authorised to keep an inn, alchouse, or victualling house, and holding the proper excise licences to sell therein beer, spirits, wine, or tobacco, a licence to sell the article for the sale of which they hold licences at any place other than the licensed premises, provided (a) they consider it conducive to public convenience, comfort, and order to do so; (b) the consent of one justice acting for the place of sale be obtained; (c) that it be for such place and for such time, not exceeding three days (or, as to victuallers, six days), as the excise authorities shall approve; and (d) that the time of sale must be from such hour not earlier than sunrise to such hour, nor later than ten p.m., as may be specified in the justice's consent; but in the case of any public dinner or ball the discretion of the justice is unlimited. Such licence must be produced on request by any officer of excise, and must not authorise selling on Sunday, Christmas Day, Good Friday, or any day appointed for a public fast or thanksgiving (25 & 26 Vict. c. 22, s. 13; 26 & 27 Vict. c. 33, s. 20; L. A. 1874, s. 19).

A similar licence, subject to the same conditions, may be granted to holders of refreshment house licences, retail wine on-licences, retail beer on-licences, and tobacco licences, whenever the excise authorities shall consider it necessary for the accommodation of the public (27 & 28 Vict. c. 18, s. 5).

No licensed person may now sell at fairs or races without obtaining an occasional licence (L. A. 1874, s. 18).

Offences on premises with an occasional licence are dealt with like offences on any licensed premises (L. A. 1874, s. 20).

(2) For extension of hours of sale. On the application of any licensed victualler, or keeper of a refreshment house in which intoxicating liquors are sold, or holder of indoor retail licence for the sale of beer or cider, the local authority may, in his discretion, grant the applicant an occasional licence, exempting him from the provisions of the Licensing Act, 1872, relating to the closing of premises during certain hours, and on the special occasion or occasions specified in the licence (L. A. 1872, s. 29). The local authority referred to is that described under *Hours of Closing*.

The holder of such a licence must produce it on demand by a justice of the peace, constable, or officer of Inland Revenue, under a penalty not exceeding ten pounds (*ibid.* s. 64).

**4. Six-day Licences.**—On the grant of an application for a new licence, a transfer, or a renewal, the justices must, at the desire of the applicant, insert a condition that the premises are to be closed during the whole of Sunday. The notice on the premises must contain words indicating that the licence is for six days only, and any sale on a Sunday will be a selling without a licence. The advantage of such a licence is that the excise duty is only six-sevenths of that on an ordinary licence (L. A. 1872, s. 49), and may be reduced to five-sevenths by making it also an early closing licence (L. A. 1874, s. 8).

The justices cannot afterwards, on renewal or transfer, be compelled to remove this condition (*R. v. Crewkerne JJ.*, 1888, 21 Q. B. D. 85; 52 J. P. 372; 57 L. J. M. C. 127; 60 L. T. 84; 36 W. R. 629).

**5. Early Closing Licences.**—The justices, at the request of any applicant for a new licence or a removal or renewal, must insert in the grant thereof a condition that the premises be closed one hour earlier at night than they would otherwise have to be closed. The premises must be so closed, and the notice on the premises must contain such words as the justices may order for giving notice to the public that an early closing licence has been granted in respect of such premises. Six-sevenths only of the excise duty on an ordinary licence is payable (L. A. 1874, s. 7).

## II. THE LICENSING JURISDICTION.

**1. How Exercised—The Licensing Justices.**—The whole licensing jurisdiction has been placed in the hands of justices of the peace by the Licensing Acts. In the Alehouse Act, 1828, which is the foundation of this jurisdiction, "the word 'justice' shall be deemed to mean justice of the peace" (s. 37), and by the Licensing Act, 1872, "'licensing justices' means the justices having jurisdiction in respect of the grant of new licences in a licensing district under the Alehouse Act, 1828, as amended by this Act" (s. 74). The justices so acting do not constitute a Court of summary jurisdiction within sec. 50 of the Summary Jurisdiction Act, 1879 (*Boulter v. Kent JJ.*, [1897] App. Cas. 306; 61 J. P. 532).

For the purposes of the Licensing Act, 1872, the jurisdiction of the justices extends over any pier, quay, jetty, mole, or work extending from any place within their jurisdiction into or over the sea, and also over any part of a river within the ebb and flow of the tide, and any river or water running between two licensing districts is to be deemed to be within the jurisdiction of each (s. 61).

All licensing applications and questions arising thereon must be decided by the majority of the justices, not being disqualified, who are present (9 Geo. IV. c. 61, s. 9). Such majority must sign the licence (*ibid.*), or it must be sealed or stamped in such form as they may direct in their presence, and verified by the signature of their clerk (33 & 34 Vict. c. 29, s. 4; L. A. 1872, s. 40, subs. 3).

Except in the case of the *Joint Committee* (see *infra*), the chairman at licensing meetings has no casting vote. If the justices are equally divided, no order can be made, unless the application be adjourned for the attendance of additional justices (*R. v. Ashplant*, 1888, 52 J. P. 474; *R. v. Cox*, 1884, 48 J. P. 440; *R. v. Carnarvon*, 1820, 4 Barn. & Ald. 86; *R. v. Monmouthshire JJ.*, 1825, 4 Barn. & Cress. 844; 1828, 8 Barn. & Cress. 137; *R. v. Belton*, 1848, 11 Q. B. 380; 17 L. J. M. C. 70; *R. v. Rogers*, 1892, 56 J. P. 183).

As to what justices shall exercise this jurisdiction, a distinction has been made between the grant of licences in counties and in boroughs.

(1) *Counties*.—"County" does not include a county of a city or a county of a town, but means any county, riding, parts, division, or liberty of a county having a separate commission of the peace and a separate Court of Quarter Sessions (L. A. 1872, s. 74). Complete jurisdiction is vested in all county justices, not being expressly disqualified (9 Geo. IV. c. 61, s. 1; 32 & 33 Vict. c. 27, s. 8; 9 Geo. IV. c. 61, ss. 4, 14; 33 & 34 Vict. c. 29, s. 4; L. A. 1872, ss. 50, 60).

(2) *Boroughs*.—"Borough" means a county of a city, county of a town, city, municipal borough, Cinque Port and its liberties, town corporate or other place in which a general annual licensing meeting is held in pursuance of the Intoxicating Liquors Licensing Act, 1828, exclusive of a petty sessional division of a county (L. A. 1872, s. 74).

When in any borough two justices, not disqualified, do not attend, the justices of any adjoining county may act with the borough justices in licensing matters (9 Geo. IV. c. 61, s. 7). This does not extend to the Cinque Ports or either of the two ancient towns (Winchelsea and Rye), but in such case any of the justices of one such port or town may act with the justices of any other of them (*ibid.* s. 8).

Renewals and transfers (under 9 Geo. IV. c. 61, ss. 4, 14) of licences may be granted by all borough justices, not disqualified (9 Geo. IV. c. 61, s. 1; 32 & 33 Vict. c. 27, s. 8; 33 & 34 Vict. c. 29, s. 4), but as to the grant of new licences and removal orders, the Licensing Act, 1872, s. 38, divides boroughs for licensing purposes into those which have ten justices acting for the borough and those which have less.

(i.) In boroughs in which there are ten justices at the commencement of the time appointed for the annual appointment of a licensing committee (*i.e.* in the country, the fortnight before the 20th of August, and in Middlesex, Surrey and London, before the 1st of March), all such justices shall annually, during the fortnight before which such licensing meeting may be held, appoint from among themselves a committee of not less than three nor more than seven in number, not being persons disqualified, of whom three shall form a quorum. Vacancies may be filled up by the justices by whom the committee is appointed. Retiring members may be reappointed and continue to act until their successors are appointed. This committee is called the **BOROUGH LICENSING COMMITTEE**, and it has power to grant new licences and to make removal orders in respect of premises within the borough, and for such purposes to perform all the duties and to be subject to the obligations of licensing justices (L. A. 1872, ss. 38, 50).



(ii.) In boroughs in which there are not ten justices, new licences and removal orders may be granted by the qualified borough justices (L. A. 1872, ss. 38, 50).

(3) *Discretion of the Justices.*—The discretion of the justices is in some cases absolute, in others limited; but in both cases it must be exercised judicially (*R. v. Boteler*, 1864, 4 B. & S. 959; 33 L. J. M. C. 101; 28 J. P. 453). They are bound to hear all applications and oppositions thereto which are in order, and to see that all the statutory requirements have been complied with.

(i) *Absolute Discretion.*—They have an absolute discretion to refuse applications, subject to the exceptions enumerated below, and no action lies against them for refusal (*Basset v. Goodchild*, 1770, 3 Wils. 121), nor are they bound to state their reasons. It is a sufficient ground that there are already too many licences (*R. v. Lancashire JJ., In re Tyson*, 1870, L. R. 6 Q. B. 97; 35 J. P. 170; 40 L. J. M. C. 17; 23 L. T. 461; 19 W. R. 204; *Boodle v. Birmingham JJ.*, 1881, 45 J. P. 635), or that the house is too remote for proper police supervision (*Sharp v. Wakefield*, [1891] 1 App. Cas. 473; 55 J. P. 212; 60 L. J. Q. B. 209; 64 L. T. 180; 39 W. R. 561).

They should not lay down any general principle limiting their jurisdiction (*R. v. Sylvester*, 1862, 31 L. J. M. C. 93; 26 J. P. 151; 2 B. & S. 322; 5 L. T. 794; 8 Jur. N. S. 484; *R. v. Walsall*, 1854, 24 L. T. 111; 18 J. P. 757; 3 C. L. R. 100), nor annex any condition to the grant, such as the payment of money in reduction of the rates (*R. v. Bowman*, [1898] 62 J. P. 193).

(ii) *Limited Discretion.*—In the following cases the discretion of the justices is limited:—

(a) Applications for new certificates, or for renewals, transfers, or removals, under the Wine and Beerhouse Acts, and the Licensing Act, 1872, in respect of wine or spirits, or sweets or cider, not to be consumed on the premises, can only be refused on one of the following four grounds:—

(1) That the applicant has failed to produce satisfactory evidence of good character.

(2) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character. Convictions of a previous occupier may be given in evidence to prove disorderly character of the house (*R. v. Miskin Higher JJ.*, [1893] 1 Q. B. 275; 57 J. P. 263; 67 L. T. 680; *Latimer v. Birmingham JJ.*, 1896, 60 J. P. 660).

(3) That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles.

(4) That, the applicant, or the house in respect of which he applies, is not duly qualified, as by law required. Where the refusal is on the ground that the house is not so qualified, the justices must specify in writing to the applicant the grounds of their decision (32 & 33 Vict. c. 27, s. 8; L. A. 1872, ss. 69, 74; 43 Vict. c. 6, s. 1).

The objection to the qualification of premises does not apply to off-licences for wines, sweets, spirits, and liqueurs; for these are not subject to any valuation qualification.

The above limitations apply equally to applications for transfers and

renewals (*Simonds v. Blackheath JJ.*, 1886, 17 Q. B. D. 765; 50 J. P. 742; 55 L. J. M. C. 166; 35 W. R. 167).

The justices must state, even although not asked, the grounds of refusal at the time of refusing the application (*Ex parte Smith, R. v. Surrey JJ.*, 1878, 3 Q. B. D. 374; 47 L. J. M. C. 104; 42 J. P. 598; 26 W. R. 682).

(b) Where a licence for the sale by retail of beer, cider, or wine, to be consumed on the premises was in existence as to any house or shop on the 1st May. 1869, and has since been continuously renewed either by the original licensee or by any transferee, the renewal of such licence shall not be refused except on one of the grounds above mentioned (32 & 33 Vict. c. 27, s. 19; 33 & 34 Vict. c. 29, s. 7; L. A. 1872, Sched.).

This limitation does not apply if the licence has been allowed to expire before application for transfer or renewal (*Murray v. Freer*, [1894] App. Cas. 576; 63 L. J. M. C. 242; 58 J. P. 508; 71 L. T. 444). Nor does it apply to any premises except those originally licensed, and therefore, where the old premises were required for a public improvement, the justices were not bound to renew to new premises (*Traynor v. Jones*, [1894] 1 Q. B. 83; 57 J. P. 724; 58 J. P. 182; 63 L. J. M. C. 31; 69 L. T. 862). The section applies to renewals for the same kind of liquor only as the original licence applied to (*R. v. King or Manchester JJ.*, 1887, 20 Q. B. D. 430; 52 J. P. 164; 57 L. J. M. C. 20; 58 L. T. 607; 36 W. R. 600).

(4) *Disqualifications of Justices.*—By sec. 60 of the Licensing Act, 1872, no justice may act under that Act or under any of the Intoxicating Liquor Licensing Acts (by sec. 74 this means 9 Geo. IV. c. 61; 32 & 33 Vict. c. 27; 33 & 34 Vict. c. 29), except in offences involving drunkenness (s. 12)—

(a) Who is, or is in partnership with or holds any share, in any company which is a common brewer, distiller, maker of malt for sale, or retailer of malt or of any intoxicating liquor in the licensing district, or in the district or districts adjoining to that in which such justice usually acts.

Such justice may not vote in the election of a licensing committee for his district (*A.-G. v. Willett*, 1896, 60 J. P. 437; 12 T. L. R. 494).

(b) In respect of any premises in the profits to which such justice is interested, or of which he is wholly or partly the owner, lessee, or occupier, or for the owner, lessee, or occupier of which he is the manager or agent. But this does not apply to a justice having vested in him a legal interest only, and not a beneficial interest, in such premises or the profits thereof.

Any such justice who in these cases acts knowingly renders himself liable for every such offence to a penalty not exceeding one hundred pounds, to be recovered in the High Court of Justice at the instance of the Crown (L. A. 1872, s. 60; 36 & 37 Vict. c. 66, s. 16; *Bradlaugh v. Clark*, 1883, 8 App. Cas. 354). But he is not liable for more than one offence committed before the institution of proceedings.

Acts done by such justices are not invalid by reason only of such disqualification.

As the Beerhouse Acts do not come within the meaning of the "Intoxicating Liquor Licensing Acts," the above disqualifications would not apply to proceedings under these Acts.

**2. Where Exercised.**—The licensing jurisdiction may be exercised according to the nature of the business (a) at the general annual licensing meeting and its adjournment, (b) before the confirming authority, (c) at special transfer sessions, or (d) at petty sessions. Of these in order—

(1) *The General Annual Licensing Meeting.*—It is enacted by sec. 1 of the Alehouse Act of 1828 that "in every division of every county and riding, and of every division of the county of Lincoln, and in every hundred

of every county, not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, city, and town corporate in that part of the United Kingdom called England, there shall be annually holden a special session of the justices of the peace (to be called the *general annual licensing meeting*) for the purpose of granting licences to persons keeping or about to keep inns, alehouses, and victualling houses, to sell exciseable liquors by retail to be drunk or consumed on the premises therein specified." It is also enacted that such meetings shall be holden in the counties of Middlesex and Surrey (including the county of London, 51 & 52 Vict. c. 41, s. 40) within the first ten days of the month of March, and in every other county on some day between the 20th of August and the 14th of September inclusive; and it shall be lawful for the justices acting in and for such county or place assembled at such meeting, or at any adjournment thereof, and not disqualified from acting, to grant licences for the purposes aforesaid to such persons as the justices shall in the execution of their powers, and in the exercise of their discretion, deem fit and proper (9 Geo. IV. c. 61, s. 1).

As already stated, justices at their annual meeting or Brewster Sessions, as it is sometimes called, could originally only grant licences to persons keeping or about to keep inns, alehouses, and victualling houses, but by subsequent legislation it applies to nearly all retail licences. Disputes formerly existed in boroughs not having a separate Court of Quarter Sessions between the county and borough justices, where there was no intromittant clause in the charter of the borough (*Candlish v. Simpson*, 1862, 1 B. & S. 357; *Brown v. Nicholson*, 1858, 5 C. B. N. S. 468); but these disputes were put an end to in 1861 by an Act of that year (24 & 25 Vict. c. 75); and now by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 246, it is enacted that in the Alehouse Act, 1828, the expressions "town corporate," "county or place," and "division or place," include every borough having a separate commission of the peace. By sec. 248 of that Act the licensing authority of county justices was conferred on the justices of the five boroughs known as the Cinque Ports (see also 9 Geo. IV. c. 61, s. 8; and *Paterson's Licensing Acts*, 11th ed., by Mackenzie, p. 218).

In every division or place where there is to be held a general annual licensing meeting there must be held, twenty-one days at the least before such annual meeting, a petty session of the justices acting for such county or place, the majority of whom then present shall, by a precept under their hands, appoint the day, hour, and place upon and in which such annual meeting for such division or place shall be held (9 Geo. IV. c. 61, s. 2). They shall also direct a precept (a) to the high constable, if such division or place be wholly or partly within the metropolitan police district or the city of London (*ibid.*; 32 & 33 Vict. c. 47, s. 3); and (b) to the clerk of the justices, if such place be without the metropolitan police district (*ibid.*), requiring him within five days next ensuing that on which he shall have received the precept, to order the several petty constables or other peace officers within his constablewick to affix, or cause to be affixed, on the door of the church or chapel, and where there shall be no church or chapel, on some other public and conspicuous place within their respective districts, a notice of the day, hour, and place at which such meeting is appointed to be held, and to give to or leave at the dwelling-house of each and every justice acting for such division or place, and of each and every person keeping an inn, or who shall have given a notice of his intention to keep an inn, and to apply for a licence to sell exciseable liquors by retail, to be drunk or consumed on the premises, within their respective districts, a copy of such

Notice (9 Geo. IV. c. 61, s. 2). The notice will now be sent to all holders of a justices' licence, and to persons who have made application for such a licence.

The justices must at their annual general licensing meeting appoint at least one adjourned meeting, even although there is no business, to be held at any convenient place or places during the month of August or September if in the country, and during the month of March if in Middlesex, Surrey, or London (*ibid.* s. 3). The first adjourned meeting must not be held on any of the five days following the day of holding the general annual licensing meeting (*ibid.*). If justices sit more than one day to dispose of the business at the general meeting, their sitting on the second or subsequent days will not be adjournment days within the meaning of the provision (*Paterson's Licensing Acts*, 11th ed., by Mackenzie, p. 214). The justices may and should so arrange the adjournment days as allow a person who has not given notice for the annual meeting to give such notice in time for the adjournment day (*In re v. Drake, R. v. West Riding JJ.*, 1869, L. R. 5 Q. B. 33; 34 J. P. 4). Where an applicant applied at the general meeting for a spirit dealer's retail licence, and failed because he had not then taken out the dealer's licence, it was held that he might take out such dealer's licence and give fresh notices for the adjournment day (*Ex parte Maugham, R. v. Kirkdale JJ.*, 1875, 1 Q. B. D. 49; 40 J. P. 39). When premises are not of sufficient annual value at the date of the general meeting, they may be made sufficient in time for the adjournment (*R. v. Montague*, 1885, 49 J. P. 55). Where a person has applied for a certificate and has been refused on a ground personal to the applicant, another person may apply for a certificate at the adjourned meeting (*Drake's case, supra*); but if the ground of refusal is not personal, but relates to the character of the house, they may properly decline to rehear the same application on the same materials at the adjournment day, though a fresh notice has been given (*Ex parte Rushworth*, 1870, 23 L. T. 120; 34 J. P. 676). Every adjourned meeting under sec. 3 of the Alehouse Act, 1828, is but a continuation of the general annual licensing meeting; the general annual licensing meeting and every such adjourned meeting form together, in contemplation of law, but one meeting (*R. v. Anglesey JJ., Ex parte Williams*, 1895, 59 J. P. 743; 69 L. J. M. C. 12; 15 R. R. 614). An objection being taken, the justices may adjourn "to a future day," not necessarily comprised in an adjournment of the general annual meeting (Hawkins, J., in *R. v. Anglesey, Ex parte Williams, supra*; *R. v. Denbighshire, Ex parte Fisher*, 1895, 59 J. P. 708). The justices sitting at a general meeting or an adjournment cannot adjourn any matter to a special transfer sessions, as these are two distinct sessions dealing with different classes of business (*R. v. Newcastle JJ.*, 1887, 51 J. P. 244).

Whenever the justices shall have ordered any such adjournment of the general annual licensing meeting, the day, hour, and place for holding every such adjourned meeting shall be appointed by precept of the majority of the justices directed in the same way, and similar notices shall be given by the same officer as in the case of notices (see *supra*, p. 396, *ante*) of the general annual meeting (9 Geo. IV. c. 61, s. 5). It is not, however, necessary to serve copies of notices of any adjournment on holders of licences or applicants for licences who are not required to attend at such adjourned meeting (37 & 38 Vict. c. 49, s. 36).

A new licence, a renewal of a licence, or an order sanctioning the removal of a licence can only be granted at the annual meeting, or at an

adjournment thereof (9 Geo. IV. c. 61, ss. 1, 13; 32 & 33 Vict. c. 27, s. 5; 35 & 36 Vict. c. 94, s. 50; 43 Vict. c. 6, s. 2).

In *Boulter v. Kent JJ.* (see *infra*) it was held that the general annual licensing meeting is not a Court of summary jurisdiction within the meaning of the Summary Jurisdiction Acts.

(2) *The Transfer or Special Sessions.*—By sec. 4 of 9 Geo. IV. c. 61, it is provided that “the justices assembled at the general annual licensing meeting in every year shall appoint not less than four nor more than eight special sessions to be holden in the division or place for which each such meeting shall be holden in the year next ensuing such general annual licensing meeting, at periods as near as may be equally distant, at which special sessions it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail, to be drunk or consumed on the premises.”

The cases in which a transfer may be granted under this section are enumerated in sec. 14 (see *Applications; Transfers*, p. 401).

(3) *Petty Sessions.*—Where special sessions have power to transfer a licence under 9 Geo. IV. c. 61 (see p. 401), the majority of the justices in the petty sessions of the district in which any licensed house is situated, at any time when no special sessions shall be held for such district, may, by indorsement under their hands and seals on any licence duly granted under that Act, authorise (if they deem proper, after examining upon oath all necessary parties) any proposed transferee of such licence, not being a person disqualified by that Act, to carry on the business of a licensed victualler on such premises; thereupon the excise officer is empowered to indorse on the excise licence a similar authority. This licence remains in force only until the holding of the next special sessions for the district, at which, upon application by the transferee under the Act, the justices shall hear and dispose of such application according to the provisions of the Act. In the metropolitan police district (saving the borough of Southwark), when the premises are situated within any of the police court divisions the application must be made to one of the police magistrates sitting in any one of the police courts. A person obtaining such authority is, during its continuance, subject in all respects to the provisions of the Licensing Acts (5 & 6 Vict. c. 44).

(4) *The Confirming Authority.*—(a) *In Counties.*—In counties a grant of a new licence is not valid unless it is confirmed by a standing committee of the county justices. The justices in Quarter Sessions assembled for every county shall annually appoint from among themselves one or more such committees to act in assigned areas. The committee must consist of not less than three nor more than twelve members, of whom three shall form a quorum, and vacancies are to be filled up from time to time by the justices in Quarter Sessions by whom the committee is appointed.

It is a standing committee of the Quarter Sessions, by which it is appointed for the succeeding year; retiring members may be reappointed and continue to act until their successors are appointed. The business of the committee and its meetings are governed by regulations made by the justices in Quarter Sessions. The clerk of the peace of the county is the clerk of the committee, and must, by himself or by his deputy, perform such duties

he is required by law to perform in relation to the justices in Quarter Sessions assembled.

(b) *In Boroughs*.—(i.) In boroughs in which there are ten justices at the commencement of the time appointed for the annual appointment of a licensing committee (*i.e.* in the country, the fortnight before the 20th of August, and in Middlesex, Surrey and London before the 1st of March), the grant of licences must be confirmed by all such justices, or by a majority of them present at any meeting assembled for the purpose of confirming such licences (L. A. 1872, s. 38).

(ii.) In boroughs in which there are not ten justices acting at such time as aforesaid, the grant of licences must be confirmed by a *Joint Committee* consisting of three justices of the county in which such borough is situate and three justices of the borough qualified to act under the Act, of whom five shall form a quorum. The county justices are to be appointed by the county licensing committee, and may be members of more than one of such joint committees. The borough justices are to be appointed by the justices of the borough, or by a majority of them assembled at any meeting held for that purpose. Vacancies are to be filled up by the authority who appointed the person creating the vacancy. The senior magistrate present at any meeting shall be chairman, and as such has a casting vote (L. A. 1872, s. 38).

Excepting as to the appointment of the joint committee, county justices shall not have licensing jurisdiction in a borough in which the borough justices have concurrent jurisdiction (*ibid.*).

By sec. 21 of the Licensing Act, 1874, if there are not three borough magistrates the deficiency is to be supplied by county justices, to be appointed by the county licensing committee.

### III. LICENSING APPLICATIONS.

**1. New Licences.**—"A new licence" means a licence for the sale of any intoxicating liquor granted at a general licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted (L. A. 1874, s. 32).

The applicant must set forth in a written notice his intention to apply, his name and address, a description of the licence or licences to be applied for, and the situation of the premises. This notice must be served and advertised as follows:—

(a) It must be served on one of the overseers of the place in which the premises are situate, and on the superintendent of police of the district (*R. v. Riley*, 1889, 53 J. P. 452), at least twenty-one days before the application.

(b) Where the premises have not been theretofore licensed for the sale by retail of beer, cider, or wine, the notice must, within twenty-eight days before the application, be affixed and maintained, between the hours of ten in the morning and five in the afternoon of two consecutive Sundays, on the door of the premises and on the principal door or on one of the doors of the church or chapel of the parish in which the premises are situate (*Empson v. Met. Board*, 1861, 25 J. P. 677; 3 L. T. 624; *R. v. Hayhurst and Others*, JJ., 1896, 61 J. P. 88), or if there be no such church or chapel, on some other public and conspicuous place (32 & 33 Vict. c. 27, s. 7; 33 & 34 Vict. c. 29, s. 4).

(c) It must be advertised in some paper circulating in the place in which the premises are situate, on some day not more than four and not less than two weeks before the proposed application, and on such day or

s, if any, as may be from time to time fixed by the licensing justices (L. A. 1872, s. 40).

A notice given for the first day of the meeting holds good though the application is heard on an adjourned day (*R. v. Armstrong, Ex parte Duffy*, 1896, 65 L. J. M. C. 35; 12 T. L. R. 159).

The above times must be reckoned exclusive both of the day of giving notice and of the day of application (*R. v. Shropshire JJ.*, 1858, 8 Ad. & E. 173).

The situation of the house need not be precisely described, provided the description is sufficient to identify it (*R. v. Penkridge Division of Staffordshire*, 1892, 56 J. P. 87; 66 L. T. 371; 61 L. J. M. C. 132).

The times must be reckoned from the day on which the application is actually heard, whether at the first licensing meeting or at an adjournment thereof (*R. v. Pownall*, [1893] 2 Q. B. 158; 57 J. P. 424; 70 L. T. 138; 62 L. J. M. C. 174).

The notice may be served by post (33 & 34 Vict. c. 29, s. 4; L. A. 1872, s. 70).

All new licences and all renewals must be applied for at the general annual licensing meeting, or its adjournment. Excepting in the cases noticed above, it is in the absolute discretion of the justices to refuse a new licence without stating any reason; and provided such refusal be judicial, their decision cannot be questioned (L. A. 1874, s. 27).

If the licence be granted, it must be confirmed (see *Confirming Authority*, p. 398, *supra*) if an on-licence, but not otherwise (L. A. 1874, s. 24).

The rule is that if the licence has expired, a new licence and not a renewal or transfer must be applied for (*Murray v. Freer*, [1894] App. Cas. 576; 63 L. J. M. C. 242; 71 L. T. 444; 58 J. P. 508), as where, during rebuilding, no licence had been granted for three years (*R. v. Curzon*, 1873, L. R. 8 Q. B. 400; 42 L. J. M. C. 155; 37 J. P. 774; 29 L. T. 32; 21 W. R. 886), or the licence has been forfeited (*R. v. W. Riding JJ.*, 1888, 21 Q. B. D. 358; 52 J. P. 455; 57 L. J. M. C. 103; 36 W. R. 258).

Where licensed premises have been altered, it is a question of fact, which the justices must decide, whether or not they are substantially the same premises (*R. v. Bradford JJ.*, 1896, 60 J. P. 265; 74 L. T. 287); if they hold that they are not, a new licence must be applied for. Mere enlargement of the premises will not disentitle to renewal, though the question must be one of degree (*R. v. Raffles*, 1875, 1 Q. B. D. 207; 40 J. P. 68; 40 L. J. M. C. 61; 34 L. T. 180; 24 W. R. 536). Even where the premises have been rebuilt, taking in further ground, they have been held to be the same (*Deer v. Bell*, 1894, 64 L. J. M. C. 85; 58 J. P. 513; *Deer v. Wirrall JJ.*, 1894, 64 L. J. M. C. 85; 43 W. R. 286; 11 T. L. R. 188).

Evidence given on the hearing of an application for a new licence may be given on oath or not, as the justices think fit (*R. v. Sharman and Others, JJ.*, 1898, 62 J. P. 161).

On making application, the notice of the justice should be drawn to any structural alterations.

Any person may appear on the hearing of the application and oppose the grant of the licence without having given any previous notice, and any person so appearing, but no other, may oppose the confirmation of the grant of such licence (L. A. 1872, s. 43).

For fees payable on new licences, see 9 Geo. IV. c. 61, s. 15; 32 & 33 Vict. c. 27, s. 8; L. A. 1872, s. 36.

**2. Renewals.**—"The renewal of a licence" means a licence granted at a general annual licensing meeting by way of renewal (L. A. 1872, s. 74).

The application must be to the general annual licensing meeting, or to an adjournment thereof.

No notice of intention to apply is necessary (32 & 33 Vict. c. 27, s. 7).

The applicant need not attend in person, unless he is required to do so by the justices for some special cause personal to himself (L. A. 1872, s. 42; L. A. 1874, s. 26).

No objection to the application can be entertained unless written notice of intention to oppose, stating the grounds of opposition, has been served on the licence-holder not less than seven days before the commencement of the general annual licensing meeting, and the justices will only inquire into the grounds so stated (*Russell v. Blackheath JJ.*, 1897, 61 J. P. 696). But if objection be raised without notice, the justices may adjourn the granting of the licence to a future day, require the attendance of the licence-holder, and consider the objection as if the prescribed notice had been given (*ibid.*).

No evidence may be received with respect to a renewal which is not given on oath (*ibid.*).

The provision as to notice of objection only applies where the applicant is the holder of the licence sought to be renewed; if he is trading under a temporary licence, he is not entitled to notice (*Price v. James*, [1892] 2 Q. B. 28; 56 J. P. 471; 57 J. P. 148; 61 L. J. M. C. 203; 67 L. T. 543; 41 W. R. 57).

The person in occupation at the time of the meeting is the person entitled to apply (*R. v. Liverpool*, *infra*, p. 402; *Symons v. Wedmore*, [1894] 1 Q. B. 401).

The person objecting is strictly bound by his notice, and no evidence may be given of grounds of objection not stated therein (*Russell v. Blackheath JJ.*, 1897, 61 J. P. 696).

Though it has been questioned whether the justices may start an objection (*R. v. Anglesey JJ.*, 1895, 65 L. J. M. C. 12; 59 J. P. 744), their power to do so has been recognised, provided notice has been served on the applicant, or, after stating the objection in open Court, they have adjourned and given the applicant notice to attend (*R. v. Merthyr Tydvil JJ.*, 1885, 14 Q. B. D. 584; 49 J. P. 213; 54 L. J. M. C. 78).

Except in the cases noticed under *Discretion of the Justices*, the discretion of the justices is absolute (*Sharp v. Wakefield*, *supra*, p. 394).

The mere fact that the licence has lapsed is not a bar to renewal (*R. v. Market Bosworth JJ.*, 1887, 56 L. J. M. C. 96; 51 J. P. 438; 57 L. T. 56; 35 W. R. 629), but renewal will not be granted where the licence has been forfeited (*Hargraves v. Dawson*, 1871, 35 J. P. 342), or the failure to apply for renewal is not satisfactorily explained. The fact that the holder of the licence has not taken out the usual excise licences for some years does not affect his right to apply for a renewal (*Smith v. Hereford JJ.*, 1878, 42 J. P. 295; 48 L. J. M. C. 38; 39 L. T. 604).

No confirmation of a renewal is necessary.

**3. Transfers.**—"The transfer of a licence" means a transfer made in special sessions in exercise of the power granted to justices by the 4th section of the Act of 9 Geo. IV. c. 61 (L. A. 1872, s. 74).

As we have seen, provision was made by sec. 4 of the Alehouse Act, 1828, for the appointment of special sessions for the transfer of licences, under the circumstances provided for by sec. 14.

By sec. 14 a transfer may be obtained in certain events by certain persons. These events are—

(1) The death of the licence-holder.

(2) Sickness or other infirmity rendering the licence-holder incapable.



(3) Bankruptcy of the licence-holder.

(4) The licensed person, his heirs, executors, administrators, or assigns removing from or yielding up possession of the licensed premises.

(5) The occupier of a licensed house being about to quit it, wilfully omitting or neglecting to apply for renewal at the general annual licensing meeting or at any adjournment thereof.

(6) That the licensed premises shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose.

(7) That the licensed premises, by fire, tempest, or other unforeseen and unavoidable calamity, have been rendered unfit for the reception of travellers, and for the other legal purposes of an inn.

In such cases it shall be lawful for the justices assembled in special sessions, for the district in which the premises are situated, to grant such licences to the following persons respectively:—

(1) The heirs, executors, or administrators of the person so dying.

(2) The assigns of such person becoming incapable.

(3) The assignee or assignees of such bankrupt.

(4) and (5) The new tenant or occupier of any house having so become unoccupied, or any person to whom the heirs, etc., have sold, conveyed, or made over their interest in such house.

(6) The occupier of the house required for public improvements, who shall open and keep as an inn some other fit and convenient house. The application must be made by the licensed person occupying the old premises (*R. v. West Riding JJ.*, [1898] 1 Q. B. 503).

But such transfers may only be granted subject to the following conditions:—

(1) Such licence shall continue in force only until the 5th day of April or the 10th day of October then next ensuing, as the case may be.

(2) If liquor has not been sold on the premises under a licence granted at the general annual licensing meeting immediately preceding the special sessions, for the sale thereon by retail of liquor to be consumed on the premises, the applicant must on some Sunday within the six weeks preceding such session, between the hours of 10 a.m. and 4 p.m., cause to be affixed on the door of such house, and on the door of the church or chapel, or if none, on some other public and conspicuous place within such parish or place, the same notice as is required on an application for a new licence (see *supra*), and shall serve it in like manner.

If the applicant for the transfer to a new occupier be the licence-holder, he must serve notice fourteen days before the special sessions on one of the overseers of the parish and on the superintendent of police of the district, signed by him or his agent, containing the transferee's name and place of residence, and his trade or calling during the six preceding months (*L. A. 1872, s. 40, subs. 2; R. v. Grove and R. v. Hughes, infra*).

If the transferee himself applies, no notice is necessary except under the circumstances in the second of the above provisoes (*R. v. Grove*, 1893, 57 J. P. 454; 9 T. L. R. 185; *R. v. Hughes*, [1893] 2 Q. B. 530; 58 J. P. 151; 62 L. J. M. C. 150).

The application should be made before the expiration of the licence, but if all the events giving power to transfer have occurred during the current year,\* a transfer may be granted, for the jurisdiction depends on the happening of such events, and not on the time of application (*R. v. Lawrence or Liverpool JJ.*, 1883, 11 Q. B. D. 638; 47 J. P. 596; 52 L. J. M. C. 114; 40 L. T. 244; 32 W. R. 20).

The discretion of the justices is the same as in the cases of applications for new licences and for renewals (*Simmonds v. Blackheath JJ.*, *supra*, p. 395).

A transfer will not be granted where the applicant has had full opportunity of applying for a renewal and has failed to do so (*R. v. Powell*, [1891] 2 Q. B. 693; 60 L. J. M. C. 594; 65 L. T. 210; 39 W. R. 630; 55 J. P. 422; 56 J. P. 52).

Infancy is not a disqualification for a transfer (*Rose v. Frogley*, 1893, 57 J. P. 376; 62 L. J. M. C. 181; 69 L. T. 346).

If the licence-holder dies or becomes bankrupt, or enters into liquidation by assignment, before the expiration of the licence, the heirs, executors, administrators, or assigns, or the trustee of such person, may sell on the licensed premises until the next special session, or if it be held within fourteen days, at the next special session after that, without incurring any penalty under sec. 3 of the Licensing Act, 1872.

**4. Temporary Transfers.**—(See *Petty Sessions*, *supra*.) The holder of such a temporary authority to sell is not a "licensed person" within sec. 42 of the Licensing Act, 1872, and therefore is not entitled to notice of opposition to his application for renewal as provided by that section (*Price v. James*, [1892] 2 Q. B. 428; 56 J. P. 471; 57 J. P. 148; 61 L. J. M. C. 203; 67 L. T. 543; 41 W. R. 57).

Where any licensed person is convicted for the first time of any one of the following offences:—

(1) Making an internal communication between his licensed premises and any unlicensed premises;

(2) Forging a certificate under the Wine and Beerhouse Acts, 1869 and 1870;

(3) Selling spirits without a spirit licence;

(4) Any felony;

and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a Court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions, and a further application to such special sessions for a grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority, and to the grant of licences at special sessions, shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee (L. A. 1874, s. 15).

In the case of felony, the landlord and new tenant are not entirely in the position of new tenants under the Alehouse Act, 1828, s. 14; they have only the two remedies stated, namely, the application to petty sessions and afterwards to special sessions (*Stevens v. Green or Sharnbrook JJ.*, 1889, 23 Q. B. D. 143; 58 L. J. M. C. 167; 61 L. T. 240; 37 W. R. 605; 53 J. P. 423).

**5. Removal of Licence.**—Licences may be removed from one part of a licensing district to another part of the same district, or from one licensing district to another within the same county by the person desiring to be the owner of the licence when removed. The application for removal is subject to the provisions governing the grant of new licences (see *New Licences*, *supra*), and in addition thereto notice must be served upon the owner of the old premises personally or by registered post, and to the holder of the licence, unless he is the applicant. The justices must not sanction the removal unless satisfied that no objection is made by such persons or by any other person whom they shall determine to have a right to

object to the removal. No removal order shall be valid unless confirmed by the confirming authority of the licensing district (L. A. 1872, s. 50).

The words "by any other person" would seem to include any person having a legal interest in the premises, such as a mortgagee (*Garrett v. Middlesex JJ.*, 1884, 12 Q. B. D. 620; 48 J. P. 358; 53 L. J. M. C. 81; 32 W. R. 646).

The object of this provision is generally more easily attained by applying for a new licence and undertaking not to renew some other existing licence.

This section applies to off-licences, therefore an order by justices for removal of an off-licence without the notices required having been given was held invalid (*R. v. Thornton*, [1897] 2 Q. B. 308; [1898] 1 Q. B. 334).

**6. Provisional Licences.**—Any person interested in any premises about to be constructed, or in course of construction, for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises, may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of such premises; and the justices and confirming authority, if satisfied with the plans submitted to them of such house, and that if such premises had been actually constructed in accordance with such plans they would on application have granted and confirmed such a licence in respect thereof, may make such provisional grant and order of confirmation accordingly. Such grant and order is not valid until declared by the justices, at their annual meeting or at a special sessions, to be final by their order made after such notice has been given as they may require. Such declaration shall be made if the justices are satisfied that the house has been completed in accordance with such plans as aforesaid, and that no objection can be made to the character of the holder of such provisional licence. Such grant is subject to the same conditions as the grant of a new licence, but the notice may be put up in a conspicuous position on any part of the premises instead of on the door. This extends, with the necessary variations, to the provisional removal to any premises of an existing licence under sec. 50 of the Licensing Act, 1872 (L. A. 1874, s. 22).

The justices cannot refuse the final order if the house, when completed, is substantially in accordance with the plans which they have sanctioned, and the licence-holder is a fit person (*R. v. London County JJ.*, 1889, 24 Q. B. D. 341; 54 J. P. 213; 59 L. J. M. C. 71; 62 L. T. 700; 38 W. R. 330). Where the buildings are not completed, or the justices have refused the final order, within the licensing year, the provisional licence may be renewed like any other licence, but it remains provisional until the final order has been obtained (*ibid.*).

#### IV. LICENSING APPEALS.

*Appeals to Quarter Sessions.*—No appeal lies for a refusal to grant a new licence (9 Geo. IV. c. 61, s. 27; L. A. 1872, Sched. 2; L. A. 1874, s. 27) or a removal order (L. A. 1872, s. 50).

With regard to renewals and transfers, an appeal lies against a refusal of the justices (s. 27 of the Alehouse Act, 1828, as amended by later Acts), but the provisions of that section, and of the Acts amending it, have been so much affected by the case of *Boulter v. Kent JJ.* (see p. 405), that the present state of the law is not altogether certain.

By sec. 27, as amended, any person aggrieved by any act of the licensing justices might appeal to the first Quarter Sessions of the county held after fifteen days of the act appealed against, provided—

(a) He gives written notice of his intention to appeal, signed by himself

or his agent, containing the grounds thereof, to the justices within five days of the decision appealed against, and at least fourteen days before the Quarter Sessions (12 & 13 Vict. c. 45, s. 1, which is repealed by 47 & 48 Vict. c. 43, only "so far as relates to any appeal against an order of a Court of summary jurisdiction," which this is not).

(b) He must within such five days enter into a recognisance, with two sufficient sureties, before a justice acting for such place, to appear and try his appeal, and to pay any costs awarded against him.

On hearing the appeal, the Court of Quarter Sessions may make such order, with or without costs, as to the Court shall seem meet: such order, subject to the statement of a special case, shall be final. If an application for a renewal or transfer be granted, it shall be the same as if granted by the general annual licensing meeting, or by special sessions.

The Court may issue process to enforce its orders.

No justice whose act is appealed against may sit on such appeal.

If the cause of complaint arose within any liberty, county of a town, city, or town corporate, the appeal may be to the Quarter Sessions of the county within or adjoining to which such liberty or place shall be situate.

The person aggrieved is the person directly affected, *e.g.* a person whose licence has been refused (*R. v. Deane*, 1841, 2 Q. B. 96), not a person consequentially aggrieved, *e.g.* a rival trader (*R. v. Middlesex JJ.*, 1832, 3 Barn. & Adol. 938).

In *Boulter v. Kent JJ.* it was held that justices at a licensing meeting are not a Court of summary jurisdiction, that a refusal to renew a licence is not "a conviction or order," and appeals against such refusal are not governed by sec. 31 of the Summary Jurisdiction Act, 1879. Therefore Quarter Sessions had no power to make an order for costs against an objector who did not appear on the appeal.

After the notice has been given and the recognisance entered into, the justice before whom it has been entered into may summon and bind over any person to give evidence, and on failure of such person to be so bound or to obey the summons, may issue a warrant for his apprehension, and may commit him to gaol until he enters into such recognisance or is otherwise discharged by law (9 Geo. IV. c. 61, s. 28).

The Court which decides the appeal may order the appellant, if not successful, to pay all costs and charges incurred by any justice in consequence of such appeal, and in default may commit him to gaol until such payment; if the appeal be successful, the Court may order the treasurer of the county or place for which such justice acts to pay such costs, and the treasurer is authorised to pay the same (*ibid.* s. 29). Where justices make themselves "parties" to an appeal, they may be refused their costs (*R. v. London JJ.* [1895], 1 Q. B. 616).

If the licence expires during the pendency of the appeal, a temporary licence may be obtained from the Inland Revenue until the appeal is decided (L. A. 1872, s. 53).

If any person feels aggrieved by any order or conviction made by a Court of summary jurisdiction, the person so aggrieved may appeal therefrom to the next Court of Quarter Sessions (L. A. 1872, s. 52).

This can now apply only to the offences, and not to licensing applications, and the provisions of the Summary Jurisdiction Acts, 1879 and 1884, will apply to such appeals (*Boulter v. Kent JJ.*, *supra*).

A landlord cannot appeal against the conviction of his tenant (*R. v. Andover JJ.*, 1886, 16 Q. B. D. 711; 50 J. P. 549; 55 L. J. M. C. 143; 55 L. T. 33; 34 W. R. 456).

*Stating Case for the High Court.*—Though this was for many years the common method of appealing on points of law from the decision of the licensing justices, it cannot be resorted to now that the licensing justices have been held not to be a Court of summary jurisdiction. But it is still the appropriate method of obtaining the decision of the High Court on points of law involved in the determination of any appeal at Quarter Sessions.

*Mandamus.*—This lies where the licensing justices have failed to hear and determine an application (see *MANDAMUS*).

*Certiorari and Prohibition.*—It was formerly the practice for any person aggrieved to apply to the High Court for a writ of *certiorari* to bring up and quash the grant of a licence made without jurisdiction, or by an interested or biassed justice; the application had to be made within six months of the grant (*R. v. Surrey JJ.*, 1888, 52 J. P. 423; *R. v. Fraser*, 1893, 47 J. P. 500); but it has since been held in *R. v. Sharman*, [1898] W. N. 23 (9), that *certiorari* does not lie. Prohibition is to prevent the justices from entertaining an application where they have no jurisdiction, but it is generally of little use, owing to the rapidity with which applications are disposed of.

#### V. CLOSING HOURS.

All premises in which intoxicating liquors are sold by retail shall be closed as follows:—

(1) If situate within the metropolitan districts—

(a) On Saturday night from midnight until 1 p.m. on the following Sunday; and

(b) On Sunday night from 11 p.m. until 5 a.m. on the following morning; and

(c) On all other days from 12.30 a.m. until 5 a.m. on the same morning.

(2) If situate beyond the metropolitan district, and in the metropolitan police district or in a town (*i.e.* an urban sanitary district under the Public Health Act, 1872, containing a thousand inhabitants, and any adjacent collection of houses declared to be part of such town by an order of the county licensing committee), or in a populous place (*i.e.* an area with a population of not less than one thousand, determined by reason of its density to be a populous place by order of the county licensing committee)—

(a) On Saturday night from 11 p.m. until 12.30 p.m. on the following morning; and

(b) On Sunday from 10 p.m. until 6 a.m. on the following morning; and

(c) On other days from 11 p.m. until 6 a.m. on the following day; and

(3) If situate elsewhere than in the metropolitan district or the metropolitan police district or such town or populous place as aforesaid—

(a) On Saturday from 10 p.m. until 12.30 p.m. on the following Sunday; and

(b) On Sunday from 10 p.m. until 6 a.m. on the following day; and

(c) On other days from 10 p.m. until 6 a.m. on the following day.

In any case the premises must be closed on Sunday from 3 p.m. where the hour of opening is 1 p.m., and from 2.30 p.m. where it is 12.30 p.m. until 6 p.m. Christmas Day and Good Friday are to be treated as Sundays, and the days preceding them as Saturdays; but this is not to alter the hours during which such premises are to be closed on Sunday when Christmas Day immediately precedes or succeeds Sunday (L. A. 1874, ss. 3, 32).

These provisions apply to retail excise licences not requiring a justices' certificate (*Martin v. Barker*, 1881, 50 L. J. M. C. 109; 45 L. T. 214; 45 J. P. 749). If liquor be sold on premises where other things are sold, the

part used for selling liquors must be closed during closing hours, though the rest may be kept open (*Brigden v. Heighes*, 1876, 1 Q. B. D. 330; 40 J. P. 661; *Tassell v. Orenden*, [1897] 2 Q. B. D. 383; 41 J. P. 710).

No intoxicating liquor must be consumed on premises licensed as a refreshment house, but not for the sale of any intoxicating liquor, during the hours that they would be closed if an inn (L. A. 1872, s. 27). Nor must any such house be kept open, or any refreshments or article be sold therein, between the hour at which places licensed for the sale of intoxicating liquor in the district are required to be closed and four o'clock in the morning (27 & 28 Vict. c. 64, s. 5; L. A. 1874, s. 11).

*Exemptions.*—These provisions do not apply, either wholly or in part, in the following cases:—

(1) The local authority of any licensing district, if satisfied that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling, may grant to any licensed victualler, keeper of a refreshment house, or holder of a retail licence for the sale of beer or cider, in respect of premises in the immediate neighbourhood of such market or place, an order exempting him from the provisions as to closing his premises on such days and during such time, except between the hours of one and two of the clock in the morning, as may be specified in such order. A notice, as prescribed by the local authority, stating the days and hours during which the premises may be open must be affixed in a conspicuous position outside the premises.

The order may be withdrawn or altered as the local authority may think fit.

The following are the local authorities for the above purposes:—

(a) In the metropolitan police district, the commissioner of police for the metropolis, subject to the approbation of a Secretary of State.

(b) In the city of London and the liberties thereof, so far as they are not included in the metropolitan police district, the commissioners of city police, subject to the approbation of the Lord Mayor.

(c) In any other place, two justices of the peace in petty sessions assembled (L. A. 1872, s. 26; L. A. 1874, ss. 4, 5).

(2) The licensing justices on the grant or renewal of a licence may, under similar circumstances and subject to like conditions, grant a keeper of a refreshment house not selling intoxicating liquor a licence exempting him from the provisions as to closing between the hours of two and four o'clock in the morning, or any part of such hours, during such days, times, or hours as shall be specified in such licence (28 & 29 Vict. c. 77, s. 2; L. A. 1872, Sched. II.).

(3) The licensing justices, outside the metropolitan district, may vary the hours of closing on Sundays, Good Friday, or Christmas Day, so as to accommodate such hours to the hours of public worship, by directing that the premises shall be closed until 1 p.m. instead of 12.30 p.m., in which case the premises shall be closed from 3 p.m. until 6 p.m., instead of from 2.30 p.m. until 6 p.m. Such order is not to come into force until one month after its date, it must be advertised as the justices direct, and is to remain in force until revoked (L. A. 1874, s. 6).

(4) Sales of intoxicating liquors to *bond fide* travellers and lodgers for consumption on the premises may take place at any time, as may also sales at a railway station to persons arriving at or departing from such station by railroad. It is enough that the seller honestly, and after taking reasonable precautions to ascertain the truth, believed the buyer to be a *bond fide*

traveller. No person is a traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied (L. A. 1874, s. 10).

A person who has travelled three miles simply for the purpose of obtaining liquor is not a *bona fide* traveller (*Penn v. Alexander*, [1893] 1 Q. B. 522; 68 L. T. 355; 57 J. P. 118; 9 T. L. R. 249; 62 L. J. M. C. 65; 41 W. R. 392).

## VI. DISQUALIFICATIONS.

No licence may be granted to any person, or in respect of any premises declared to be disqualified, during the continuance of such disqualification; any licence so granted is void (L. A. 1872, s. 44).

**1. Of Person.**—The following disqualify persons for holding licences either absolutely or for certain periods:—

(1) A second conviction for illicit selling may by order of the Court convicting the person disqualify him for a term not exceeding five years. On a third or subsequent conviction he may be disqualified for any term of years, or for ever (L. A. 1872, s. 3).

(2) Conviction of a licensed person for permitting his premises to be a brothel disqualifies him for ever (*ibid.* s. 15).

(3) Conviction of a licensed person for any offence required to be recorded on the licence, after two previous convictions have been recorded thereon for offences committed by him, disqualifies him for five years (*ibid.* s. 30).

(4) Every person convicted of felony shall be disqualified for ever from selling spirits by retail, and every person convicted of felony or of selling spirits without a licence shall be disqualified for ever from selling by retail beer, cider, or wine (3 & 4 Vict. c. 61, s. 7; 23 Vict. c. 27, s. 22; 33 & 34 Vict. c. 29, s. 14).

(5) Making use of a forged justices' certificate, knowing it to have been forged, disqualifies for life (32 & 33 Vict. c. 27, s. 11).

(6) Being a sheriff's officer, or officer executing the legal process of any Court of justice (9 Geo. IV. c. 61, s. 16; 1 Will. IV. c. 64; 23 Vict. c. 27, s. 8).

(7) Not being the real resident occupier of the premises in respect of which a justices' licence to sell beer by retail is sought (3 & 4 Vict. c. 61, s. 1).

**2. Of Premises.**—(1) No premises, not licensed before 10th August 1872 for the sale of intoxicating liquor to be consumed thereon, shall be qualified to receive a licence for such sale, unless—

(i.) Not being a railway refreshment room, they be of not less than the following annual value:—

If within the city of London, the jurisdiction of the London County Council, or the four-miles radius from Charing Cross, or a town of not less than one hundred thousand inhabitants, fifty pounds per annum; or, if the licence do not authorise the sale of spirits, thirty pounds per annum:

If elsewhere, or within a town containing not less than ten thousand inhabitants, thirty pounds per annum; or, if the licence do not authorise the sale of spirits, twenty pounds per annum:

If situated elsewhere, and not within any such town, fifteen pounds per annum; or, if the licence do not authorise the sale of spirits, twelve pounds per annum.

(ii.) Unless the house, exclusive of the living rooms, contains two rooms, if licensed for the sale of spirits, and otherwise one room, for the accommodation of the public. The premises must also, in the opinion of

the licensing authority, be structurally adapted to the class of licence applied for (L. A. 1872, ss. 45, 46, 47).

(2) No premises licensed before the 10th August 1872 shall be qualified, unless—

(i.) If the licence be for the sale of beer or cider to be consumed on the premises, or be a wholesale beer dealer's additional retail off-licence granted after 1870, the premises be valued at not less than fifteen pounds per annum, if within the Bills of Mortality, or in towns containing ten thousand inhabitants; not less than eleven pounds per annum in places exceeding two thousand five hundred inhabitants; nor less than eight pounds per annum in other places. But this does not apply to persons licensed before 1840 whilst they continue to occupy the same house (3 & 4 Vict. c. 61, ss. 1, 18; 26 & 27 Vict. c. 33, s. 1; 33 & 34 Vict. c. 29, s. 10; L. A. 1872, ss. 46, 47).

(ii.) If the licence be to a refreshment house for the sale of foreign wine by retail to be consumed on the premises, the premises be valued at ten pounds a year, or at twenty pounds a year if the population of the place exceeds ten thousand (23 Vict. c. 27, s. 7; L. A. 1872, s. 46).

(3) No premises, whether licensed before or after the 10th August 1872 for the sale of beer or cider for out-door consumption, shall be qualified, unless they comply with the requirements as to annual value contained in (2) (i.) above (3 & 4 Vict. c. 61, ss. 1, 18).

*Note.*—Out-door wine houses, table-beer houses, sweets and spirits houses do not require a valuation qualification.

(4) Where a person is disqualified under 1. (3) above, the premises shall, unless the Court otherwise orders, be disqualified for two years (L. A. 1872, s. 30).

(5) As to persons who had not a licence on the 10th August 1872 in respect of the same premises, the second and subsequent convictions of such persons recorded on his licence shall be recorded in the register of licences against the premises. When four convictions (whether of the same or different licensed persons) have within five years been so recorded against the premises, they shall be disqualified for one year. If the licences of two licensees of the same premises are forfeited within any period of two years, the premises shall be disqualified for one year. Notice of such disqualification must be served on the owner (L. A. 1872, s. 31).

*Protection of Owner.*—On conviction of a licence-holder for an offence, the repetition of which may disqualify the premises, the clerk of the licensing justices must serve a notice thereof on the owner of the premises.

Where any order of a Court of summary jurisdiction declares any premises to be disqualified, the order must be served on the owner of the premises, where he is not the occupier, containing a statement that the Court will hold a petty sessions at a time and place therein specified, at which the owner may appear and appeal against such order on all or any of the following grounds, but on no other grounds:—

(a) That notice of any prior offence has not been served on him.

(b) That the convicted person held under a contract made before the 10th August 1870, and could not be legally evicted between notice of the previous offence and the commission of the offence involving disqualification.

(c) That the offence resulting in disqualification occurred so soon after notice of the previous offence that, though there was legal power to evict, it could not with reasonable diligence be exercised within the time.



If satisfied that the owner is entitled to have the order cancelled, the Court may direct it to be cancelled, and it is thereon void (L. A. 1872, s. 56).

An owner cannot appeal to Quarter Sessions against the conviction although his interest may be affected (*R. v. Andover JJ.*, 1886, 16 Q. B. D. 711; 50 J. P. 549).

#### VII. OFFENCES.

The offences under the Licensing Acts are numerous. The offences for matters relating to the excise have already been enumerated under INTOXICATING LIQUOR. Here we propose to enumerate (1) Offences by Licensed Persons, and (2) Offences by Persons other than Licensed Persons.

**1. Offences by Licensed Persons.**—A person selling, or exposing for sale, any intoxicating liquor without being duly licensed, or at a place which he is not authorised by his licence to sell, is liable to a penalty not exceeding, for the first offence, £50, or imprisonment, with or without hard labour, for one month; for a second offence (under the Licensing Acts, *In re Anthers*, 1889, 22 Q. B. D. 345; 53 J. P. 116), £100, or a like imprisonment for three months, and the offender may be disqualified for any time not exceeding five years, and the licence shall be forfeited; and for a third or subsequent offence, £100, or a like imprisonment for six months, and the offender may be disqualified for any term of years, or for ever, from holding any licence for the sale of intoxicating liquors, and the liquor with the vessels containing it may be forfeited (35 & 36 Vict. c. 94, s. 3). This provision does not make the selling or exposing for sale of intoxicating liquor without a licence a crime, but only prohibits its sale or exposure for sale by a penalty enforceable by distress, and subsequent imprisonment in default of distress (cp. *Newman v. Jones*, 1886, 17 Q. B. D. 136). "Intoxicating liquor" means spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a licence from the Inland Revenue (35 & 36 Vict. c. 94, s. 74). The provision applies to all public-houses, alehouses, houses included in the Wine and Beerhouse Acts, and all those persons requiring a justices' licence or certificate. In cases where a justices' licence is not required by law, a sale by a person duly licensed in other respects is not an infringement of sec. 3, *supra* (cp. *Palmer v. Thatcher*, 1878, 3 Q. B. D. 346; 47 L. J. M. C. 54; 42 J. P. 213). In proving the sale or consumption of intoxicating liquor in this connection, it is not necessary to show that any money actually passed, or any intoxicating liquor was actually consumed, if the Court hearing the case be satisfied that a transaction in the nature of a sale actually took place, or that any consumption of intoxicating liquor was about to take place; and proof of consumption, or intended consumption, of intoxicating liquor on premises to which a licence is attached, by some person other than the occupier of, or a servant, in such premises, shall be evidence that such liquor was sold to the person consuming, or being about to consume, or carrying away the same by or on behalf of the holder of such licence (35 & 36 Vict. c. 94, s. 62). All the substantial elements of a sale must take place on the licensed premises, in the case both of on-licences and of off-licences (*Pletts v. Campbell*, [1895] 2 Q. B. 229; 64 L. J. M. C. 225; 73 L. T. 344; 43 W. R. 634; 59 J. P. 502; 15 R. 493; *Pletts v. Beattie*, [1896] 1 Q. B. 519; 60 J. P. 185; 65 L. J. M. C. 86; 74 L. T. 148; *Morrison v. Stubbs*, 1897, 61 J. P. 486). The sale mentioned in the section is such a sale as takes place

between buyer and seller in ordinary shops or places of business; and where there is a club or association of persons, on the footing of a subscription club, the committee of which buy liquor for the whole body, and then distribute it among the members according to rules and by-laws of their own, a sale is not effected within the section (*Graff v. Evans*, 1882, 8 Q. B. D. 373; 51 L. J. M. C. 25; 46 J. P. 262; 46 L. T. 347; 30 W. R. 380). In the same way, if a limited company keep a club for the use of the company, and the directors purchase liquor and direct the manager or servant to distribute it among the shareholders according to a fixed tariff, what he does is not a sale (*Newell v. Hemingway*, 1889, 53 J. P. 324; 58 L. J. M. C. 314; 60 L. T. 544). A licence, however, is required in the case of a proprietary club (*Bowyer v. Percy Club*, [1893] 2 Q. B. 154; 57 J. P. 470; 42 W. R. 29; 69 L. T. 447); and so likewise does a sham club (*Evans v. Hemingway*, 1888, 52 J. P. 134). See further, *Newman v. Jones*, 1886, 17 Q. B. D. 132; 50 J. P. 373; 55 L. J. M. C. 113; 55 L. T. 327; *Stevens v. Wood*, 1890, 54 J. P. 742; *Woodley v. Simmonds*, 1896, 60 J. P. 150; 12 T. L. R. 196.

If a licence purports to be regular on the face of it although void, it will, in general, be a good protection to anything done under it until it is quashed. Thus where a justice of the petty sessional division only was authorised to grant an occasional licence under 25 & 26 Vict. c. 22, s. 13, to sell at other places than the inn, and a justice not of the proper division granted it, the holder was held not liable for selling without a licence, there being no proof of fraud (*Stevens v. Empson*, 1876, 1 Ex. D. 100; 40 J. P. 484; 45 L. J. M. C. 63; 33 L. T. 821). So where a licence was produced, but one of the signatures of the justices was suggested to be forged, though not by the licence-holder, the justices rightly refused to admit evidence of forgery, and held the licence valid (*R. v. Minshul*, 1833, 1 N. & M. 278; see also *Thompson v. Harvey*, 1859, 4 H. & N. 254; 28 L. J. M. C. 163; 23 J. P. 150; *Allen v. Lumb*, 1893, 57 J. P. 377). The following are illustrations where the licence is deemed utterly void:—Where a licence was granted to a person who has been previously convicted of felony, though no one but himself was aware of the felony, and a formal transfer had been subsequently obtained regularly by a third party, was held void in the hands of such third party (*R. v. Jisse*, 1875, L. R. 10 Q. B. 195; 39 J. P. 213; 44 L. J. M. C. 60; 31 L. T. 842; 23 W. R. 649); but it may be added that if the convicted felon has received a free pardon, this wipes out the disqualification (*Hay v. Tower J.J.*, 1890, 24 Q. B. D. 557; 59 L. J. M. C. 79; 54 J. P. 500; 62 L. T. 290; 38 W. R. 414). A licence to a dead man is void (*Cowles v. Gale*, 1871, L. R. 7 Ch. 12; 41 L. J. Ch. 14; 25 L. T. 524; 20 W. R. 70). Where the parties, the justices, and the excise all acted on the notion that an enactment was unrepealed, and a licence was granted, the Court held it void, notwithstanding the mistake (*Pearson v. Broadbent*, 1872, 36 J. P. 485).

The question sometimes arises whether in the case of premises that have been enlarged a new licence is required, or the old licence will be sufficient to authorise a sale on the enlarged part of the premises. A licence-holder, like other traders, may enlarge and improve his premises at his own discretion, subject to the risk of the justices treating the alterations as substantial when a renewal is applied for (*Stringer v. Huddersfield J.J.*, 1875, 40 J. P. 22; 45 L. J. M. C. 39; 33 L. T. 568).

In *R. v. Raffles*, 1875, 1 Q. B. D. 207; 40 J. P. 68; 45 L. J. M. C. 61; 34 L. T. 180; 24 W. R. 536, Cockburn, C.J., said: "Whether the premises to which the licence is granted and the premises used are the same, is a

question of fact for the magistrate. I do not mean to say that if the magistrate has gone entirely wrong—that if, for instance, he had held an addition of a whole street of houses to be immaterial, it would not have been right that we should review his decision. But it would be necessary for us to see that the magistrate was clearly wrong.” The question thus became one for the justices on the occasion of a renewal or of a prosecution under sec. 3 of the Licensing Act, 1872, to determine whether the altered or enlarged premises are substantially the same as the original premises.” The High Court seldom interferes with the discretion of the justices on this point (cp. *R. v. Smith*, 1866, 31 L. T. 259; *R. v. Raffles*, *supra*; *R. v. Hampshire JJ.*, *Ballam v. Wiltshire*, 1879, 44 J. P. 72; *Mahon v. Gaskell*, 1878, 42 J. P. 583; *Deer v. Bell*, 1894, 64 L. J. M. C. 85; 58 J. P. 513; *Deer v. Wirrall JJ.*, *R. v. Wirrall JJ.*, 1894, 64 L. J. M. C. 85; 43 W. R. 286; 11 T. L. R. 188; *R. v. Bradford JJ.*, 1896, 60 J. P. 265; 74 L. T. 287).

No offence is incurred for selling without a licence if the person selling is the heir, executor, administrator, or assign of any licensed person who dies before the expiration of his licence, or by the trustee of any licensed person who is adjudged a bankrupt, or whose affairs are liquidated by arrangement before the expiration of his licence in respect of the sale or exposure for sale of any intoxicating liquor, so that such sale or exposure for sale be made on the premises specified in such licence, and takes place prior to the special session then next ensuing, or (if such special session be holden within fourteen days next after the death of the said person, or the appointment of a trustee in the case of his bankruptcy, or the liquidation of his affairs by arrangement) takes place prior to the special session holden next after such special session as last aforesaid (35 & 36 Vict. c. 94, s. 3). When the licence-holder dies intestate during the licensing year, the person who has a *prima facie* right to apply for letters of administration does not commit the offence of selling without a licence for continuing the sale of liquors until the next special transfer sessions (*Rose v. Frogley*, 1893, 57 J. P. 376; 62 L. J. M. C. 181; 5 R. 530; 69 L. T. 530; 9 T. L. R. 466; 17 Cox C. C. 685).

If the purchaser of any intoxicating liquor from a person who is not licensed to sell the same to be drunk on the premises, drinks such liquor on the premises where the same is sold, or on any highway adjoining or near such premises, the seller of such liquor shall, if it shall appear that such drinking was with his privity or consent, be, for the first offence, liable to a penalty not exceeding £10; and for the second or subsequent offence to a penalty not exceeding £20 (35 & 36 Vict. c. 94, s. 5). It was held in *Bath v. White*, 1878, 3 C. P. D. 175; 42 J. P. 375; 26 W. R. 617, that where the liquor was taken to neighbouring premises (not being the seller's), a few yards distant, and drunk on such premises and partly on the highway, an offence had not been committed with the seller's privity. If a person having an off-licence carries liquor from his premises for the purpose of its being sold on his account or for his benefit and of being consumed in any other house belonging to such licensed person, such intoxicating liquor shall be deemed to have been consumed by the purchasers thereof on the premises of such licensed person, with his privity and consent, and shall be punished as under sec. 5 (35 & 36 Vict. c. 94, s. 6). This conviction may be recorded on the licence.

A licensed person selling spirits to children under the age of sixteen to be consumed on the licensed premises is liable for a first offence to a penalty not exceeding 20s., and for a second or any subsequent offence to a

penalty not exceeding 40s. (*ibid.* s. 7), and for selling intoxicating liquors to children under the age of thirteen to be consumed on the licensed premises to the like penalties (49 & 50 Vict. c. 56).

Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards: penalties, not exceeding, for the first offence, £10; and not exceeding for any subsequent offence, £20, and forfeiture of the illegal measure (35 & 36 Vict. c. 94, s. 8). A publican who uses earthen mugs, and serves customers with them, impliedly represents them to be of imperial measure, and if they are unstamped they will be liable to seizure (*R. v. Aulton*, 30 L. J. M. C. 129; 3 El. & El. 568; 25 J. P. 69). If the customer asks for a quantity of liquor which equals or exceeds half a pint, as, for example, a "blue of beer" (a third of a quart), the seller is liable if the liquor is not supplied in a stamped measure (*Payne v. Thomas*, 1890, 60 L. J. M. C. 3; 63 L. T. 456; 39 W. R. 240; 54 J. P. 824; see further, *Addy v. Blake*, 1887, 19 Q. B. D. 478; 51 J. P. 599; 56 L. T. 711; 35 W. R. 719; *Bellamy v. Pow*, 60 J. P. 712; Weights and Measures Acts, 1878 and 1889).

A person making or using, or allowing to be made or used, any internal communication between licensed premises and premises which are used for public entertainment or resort, or as a refreshment house, is liable to a penalty not exceeding £10 a day during which the communication remains open, and in the case of the licence-holder, forfeiture of the licence (35 & 36 Vict. 94, s. 9). A licensed person having in his possession intoxicating liquor which he is not authorised to sell is liable to forfeiture of the liquor and vessels containing it, for the first offence, to a penalty not exceeding £10; and not exceeding, for any subsequent offence, £20, unless he shall account for the possession of the same to the satisfaction of the Court by which he is tried (*ibid.* s. 10). A licensed person must cause to be painted or fixed, and keep painted or fixed, on his premises, his name, with the addition after his name of the word "licensed," and of words sufficient to express the business for which the licence was granted: penalties, first offence, not exceeding £10; second and subsequent offences, £20 (*ibid.* s. 11).

If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct, to take place on his premises, or sells any intoxicating liquor to a drunken person, he shall be liable to a penalty not exceeding, for the first offence, £10; and not exceeding, for the second or any subsequent offence, £20; and the conviction may be recorded (*ibid.* s. 13). Where the evidence shows that a person who was on the premises was in fact drunk, but the evidence also shows that the licensed person did not know that such person was drunk, the licensed person cannot be convicted (*Somerset v. Wade*, [1894] 1 Q. B. 574; 63 L. J. M. C. 126; 58 J. P. 231; 70 L. T. 452; 42 W. R. 399). To supply drink to a person already drunk is to permit drunkenness (*Edmunds v. James*, [1892] 1 Q. B. 18; 56 J. P. 40; 61 L. J. M. C. 56; 40 W. R. 140; 65 L. T. 675). Finding a person drunk lying in a ditch about a hundred yards from a public-house where he had been drinking three-quarters of an hour before, is some evidence of permitting drunkenness at the public-house (*Ex parte Ethelstane*, 1875, 40 J. P. 39; 33 L. T. 339). The licensee is also liable where he knows that a person is drunk on his premises, although he has not been supplied with liquor (*Hope v. Warburton*, [1892] 2 Q. B. 134; 61 L. J. M. C. 147; 66 J. P. 328; 66 L. T. 589; 40 W. R. 510); but he must be found in the public rooms of the house. The section is absolute against the sale of

drink. Where, therefore, the customer is really drunk, the licensee cannot set up the defence that he and his servant considered the customer not to be drunk, for the risk of discovering the fact rests with the licensee (*Cundy v. Le Cocq*, 1884, 13 Q. B. D. 207; 48 J. P. 599; 53 L. J. M. C. 125; 51 L. T. 265; 32 W. R. 769). If a drunken man and a sober man enter together, and the latter orders liquor for both, it is a selling to the drunken man (*Scatchard v. Johnson*, 1888, 57 L. J. M. C. 41; 52 J. P. 389). A licensee cannot be convicted under this section (13) for being drunk on his own premises (*Warden v. Fye*, 1877, 2 C. P. D. 74; 41 J. P. 120; 46 L. J. M. C. 111; 35 L. T. 852); but he may be charged under sec. 12 (*post*, p. 416). The wrongful acts of the servant will bind the master in all cases where the servant acts within the scope of his employment, although in breach of express general instructions (*Commissioners of Police of Metropolis v. Cartman*, [1896] 1 Q. B. 655; 60 J. P. 357; 65 L. J. M. C. 113; 74 L. T. 726; 44 W. R. 637; 12 T. L. R. 334). In a conviction under this section it is not necessary to state the names of the persons who were permitted to be drunk (*Wray v. Toke*, 1848, 17 L. J. M. C. 183; 12 Q. B. 492; 12 J. P. 804).

If a licensed person knowingly permits his premises to be a habitual resort of or place of meeting of reputed prostitutes, whether the object of their so resorting or meeting is or is not prostitution, he shall, if he allow them to remain thereon longer than is necessary for the purpose of obtaining reasonable refreshment, be liable to a penalty not exceeding, for the first offence, £10; and not exceeding for the second and any subsequent offences, £20; and the conviction may be recorded (35 & 36 Vict. c. 94, s. 14). In the case of permitting premises to be used as a brothel, the licensee is liable to a penalty not exceeding £20, forfeiture of the licence, and disqualification for ever holding a licence (*ibid.* s. 15).

If a licensed person (a) knowingly harbours or knowingly suffers to remain on his premises any constable during any part of the time appointed for such constable being on duty, unless for the purpose of keeping or restoring order, or in execution of his duty; or (b) supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable; or (c) bribes, or attempts to bribe, any constable, he shall be liable to a penalty not exceeding, for the first offence, £10; and not exceeding, for the second or any subsequent offences, £20; and the conviction may be recorded (*ibid.* s. 16). If a servant knowingly serve a constable on duty, the master may be convicted, though personally having nothing to do with the matter (*Mullins v. Collins*, 1874, L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 22 W. R. 297; 38 J. P. 629). But the master or servant must know that the person is a constable on duty (*Sherras v. De Rutzen*, [1895] 1 Q. B. 918; 59 J. P. 450; 64 L. J. M. C. 218; 72 L. T. 839; 43 W. R. 526), and his being in uniform indicating that he was on duty, and not being asked if he was on duty, etc., is good *prima facie* evidence of such knowledge.

If a licensed person suffer any gaming or any unlawful game to be carried on on his premises; or opens, or keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the Gaming Act, 1854 (16 & 17 Vict. c. 119), he shall be liable to a penalty not exceeding, for the first offence, £10; and not exceeding, for the second and any subsequent offences, £20; and the conviction may be recorded (35 & 36 Vict. c. 94, s. 17). The rule under this section is that no game, however lawful in itself, if played for money or money's worth can be permitted in licensed

premises (see *Danford v. Taylor*, 1869, 20 L. T. 483; 33 J. P. 612; *Luff v. Leaper*, 1872, 36 J. P. 773; *Patten v. Rhymmer*, 1860, 3 EL. & EL. 1; 29 L. J. M. C. 189; 24 J. P. 342; 2 L. T. 352; 8 W. R. 496; *Dyson v. Mason*, 1889, 22 Q. B. D. 351; 58 L. J. M. C. 55; 53 J. P. 261; 60 L. T. 265; *Paterson's Licensing Acts*, 11th ed., p. 46). A person who goes into a bar of a public-house, and not casually, but for several days, habitually bets with people he meets there on horse-racing, though he has no interest in the room or house, may be convicted under 16 & 17 Vict. c. 119, s. 3 (*Macwilliam v. Dawson*, 1892, 56 J. P. 182; *Whitehurst v. Fincher*, 1890, 62 L. T. 433; 54 J. P. 565; see also *R. v. Worton*, [1895] 1 Q. B. 227; 64 L. J. M. C. 74; 72 L. T. 29; 18 Cox, 70; 15 R. 102). A licensed holder who knows of a bookmaker using the bar of his house for the purpose of betting with the customers may also be convicted of suffering, etc. (*Hornsby v. Raggett*, [1892] 1 Q. B. 20; 66 L. T. 21; 40 W. R. 111; 55 J. P. 708). To receive sealed packets containing bets near a public-house, and to open them in the house, does not amount to suffering the house to be used as a betting house (*Davis v. Stephenson*, 1890, 24 Q. B. D. 529; 54 J. P. 565; 59 L. J. M. C. 73; 62 L. T. 436; 38 W. R. 492).

If any person defaces or obliterates, or attempts to deface or obliterate, any record of a conviction on his licence, he shall be liable to a penalty not exceeding £5 (35 & 36 Vict. c. 94, s. 34). Keeping open premises at a time ordered by justices to be closed in case of riot is an offence—maximum penalty, £50; and justices may order the house to be closed by force (*ibid.* s. 23).

A person selling or exposing for sale or opening or keeping open premises for the sale of intoxicating liquor during prohibited hours is liable for the first offence to a penalty not exceeding £10, and for any subsequent offence not exceeding £20 (37 & 38 Vict. c. 49, s. 9). This provision overrules all local customs (*Stacy v. Milne*, 1875, 39 J. P. 103); but it does not apply to sales by wholesale dealers, who are exempt under sec. 72 of the Licensing Act, 1872 (*R. v. Jenkins*, 1891, 55 J. P. 824; 61 L. J. M. C. 57; 65 L. T. 857; 40 W. R. 318). A licensed person must keep a notice affixed to premises of any order exempting from closing hours, under a penalty of £5 (35 & 36 Vict. c. 94, s. 26); and a person keeping affixed such a notice when he does not hold such an order is liable to a penalty not exceeding £10 (*ibid.*). Intoxicating liquors must not be consumed at a refreshment house during the hours when the house would be closed if it were an inn—penalty, first offence, not exceeding £10, and any subsequent offence not exceeding £20 (*ibid.* s. 27). A constable may, for the purpose of preventing or detecting the violation of the provisions under the Licensing Acts, which it is his duty to enforce, at all times enter on any licensed premises, or premises in respect of which an occasional licence is in force—penalty on refusal, first offence, £5; second and every subsequent offence, £10 (37 & 38 Vict. c. 49, s. 16; see also 23 Vict. c. 27, s. 18). The constable must show some reasonable ground to the Court for thinking that the statute was about to be or has been violated (*Duncan v. Dowling*, [1897] 1 Q. B. 575). In *R. v. Dobbins* (1884, 48 J. P. 182) it was held that a constable had shown a sufficient reason when he stated that he wanted to see if there was anything wrong in the house, as he was going a round of visiting all the licensed houses. See further, *Caswell v. Hundred JJ.*, 54 J. P. 87; *R. v. Tott*, 1861, 30 L. J. M. C. 177; 4 L. T. 306; 25 J. P. 327; 2 W. R. 663; *Harrison v. MacL'Meel*, 1884, 48 J. P. 469; 50 L. T. 210).

The keeper of a refreshment house for wine selling or opening his house for sale of intoxicating liquor after closing time is liable—first offence, £10; subsequent offence, £20 (35 & 36 Vict. c. 94, s. 28). For not producing a licence or exemption order to a justice, constable, or Inland Revenue officer upon demand, the penalty is £10 (*ibid.* s. 264). A person licensed for beer or cider allowing wine, spirits, sweets, etc., to be brought into, or to be consumed in his house, is liable to £20 over and above excise penalties (4 & 5 Will. IV. c. 85, s. 16). A licensed person may not harbour thieves or reputed thieves, or permit them to meet in his house, or allow them to deposit stolen goods on his premises, under the penalties enumerated in the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10; and the licence must be produced to the justices on the hearing of the charge, under a further penalty of £5 (34 & 35 Vict. c. 112, s. 10).

The following further offences may be committed by licensed persons (the maximum penalty or imprisonment is stated):—Permitting wages to be paid in a public-house—penalty, £10 (46 & 47 Vict. c. 31); offences against the tenor of a *billiard licence*, or licensed person allowing billiards while house not allowed to be opened for sale of liquors, or not admitting constables—penalty, first offence, £10; second and subsequent offences, £20, being the same as for gaming (*supra*) (8 & 9 Vict. c. 109, ss. 12, 13, 14); *billets*, refusing to receive or properly to accommodate soldiers or horses, and other offences—penalty, £5 (44 & 45 Vict. c. 58, s. 110); *music and dancing*, keeping room, etc., for dancing, music, etc., without licences, in places where Acts in force, £100, recoverable by action (25 Geo. II. c. 36; 38 Vict. c. 21; 53 & 54 Vict. c. 59); *races and fairs*, selling liquor at, without an occasional licence—penalty same as selling or exposing for sale without a licence (*ante*, p. 410) (37 & 38 Vict. c. 49, s. 18). Penalties are also enforceable for adulteration under the Sale of Food and Drugs Acts, 1875 and 1879 (38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30, s. 6), and the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51).

**2. Offences by Persons other than Licensed Persons.**—The following offences may be committed (the maximum penalty or imprisonment is stated):—The occupier of unlicensed premises in which liquor is sold being privy to the sale—first offence, £20, or imprisonment for one month; second offence, £100, or imprisonment for three months; third and subsequent offences, £100, or imprisonment for six months, and the liquor found may be forfeited—the same as in the case of selling without a licence (*ante*, p. 410) (35 & 36 Vict. c. 94, s. 4).—Where a married woman clandestinely sold liquors without a licence, the husband, who was not shown to know of her conduct, could not be treated as liable for her acts (*Allen v. Lumb*, 1893, 57 J. P. 277); making internal communication between licensed premises and house of public resort, etc.—penalty, £10 a day while communication remains open (35 & 36 Vict. c. 94, s. 9); having affixed to premises words, etc., importing that a person is licensed to sell liquor when he is not authorised—penalty, first offence, £10; second and subsequent offences, £20 (*ibid.* s. 11); found drunk in a highway or public place, or on licensed premises, whether during open or (not being an inmate or lodger) during closing hours (*R. v. Pelly*, [1897] 2 Q. B. 33; 61 J. P. 373)—first offence, 10s.; second offence within a year, 20s.; and third and subsequent offences within a year, 40s. (35 & 36 Vict. c. 94, s. 12), but a licensed person is not liable to be convicted unless he was found drunk during open hours and in a public part of the premises (*Lester v. Torrens*, 1877, 2 Q. B. D. 403; 41 J. P. 821; 21 W. R. 691; 46 L. J. M. C. 280); persons in a highway or public place guilty while drunk of riotous or disorderly behaviour, or drunk

while in charge of any carriage, horses, etc., or drunk when in possession of loaded firearms—penalty, 40s., or imprisonment, with or without hard labour, for one month (35 & 36 Vict. c. 94, s. 12); drunken, violent, quarrelsome, or disorderly person on premises, or other person whose presence there renders holder of licence liable to penalty, refusing to quit premises on request—penalty, £5—such persons may be expelled by the licensed person, or his servant or by a police constable (35 & 36 Vict. c. 94, s. 18); person not an inmate, servant, or lodger, or traveller found on premises when they are required to be closed—penalty, 40s. (*ibid.* s. 25); such person not giving his name, etc., when required, or giving a false one, or giving false evidence with respect thereto—penalty, £5 (*ibid.*); person falsely representing himself to be a traveller or lodger, buying, etc., or attempting to buy, etc., liquor during closing hours—penalty, £5 (*ibid.*; 37 & 38 Vict. c. 49, s. 10); clerk to justices taking greater fees than allowed for licences or in relation to register of licences—penalty, £5 (9 Geo. IV. c. 61, s. 15; 33 & 34 Vict. c. 29, s. 4 (3); 35 & 36 Vict. c. 94, s. 36); clerk to justices or other person preventing inspection of register of licences, or taking copies or extracts, or demanding unauthorised fee—penalty, £5 (35 & 36 Vict. c. 94, s. 36); clerk to justices taking unauthorised fees for billiard licence—penalty, £5 (8 & 9 Vict. c. 109, s. 10); forging justices' certificate for a licence under the Wine and Beerhouse Acts—penalty, £20, or imprisonment for six months (32 & 33 Vict. c. 27, s. 11); witnesses refusing to attend or to be examined under the Refreshment Houses Act—penalty, £10 (23 Vict. c. 27, s. 38); drunken and disorderly persons refusing to quit refreshment houses—penalty, 40s. (*ibid.* s. 41); any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of the Licensing Act, 1874, selling or exposing for sale in such premises any intoxicating liquors, or opening or keeping open such premises for the sale of intoxicating liquors, or allowing any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises—penalty, £10; subsequent offences, £20 (37 & 38 Vict. c. 49, s. 9); any person who, by himself, or by any person in his employ or acting by his direction or with his consent, refusing or failing to admit any constable in the execution of his duty demanding to enter—penalty, £5 for first offence; £10 for second and every subsequent offence (*ibid.* s. 16); persons found on premises on entry of constable—penalty, 40s. (*ibid.* s. 17); persons found on premises on entry of constable not giving name or address, or not answering satisfactorily questions put to them by constable—penalty, £5 (37 & 38 Vict. c. 49, s. 17); selling without an occasional licence (see *ante*, p. 410); paying wages in a public-house—penalty, £10 (46 & 47 Vict. c. 31); causing or allowing a boy under fourteen or a girl under sixteen to be on licensed premises (not licensed for public entertainments) for the purpose of singing, etc., between 9 p.m. and 1 a.m., or offering anything for sale—penalty, £25, alternatively, or in default of payment of fine or in addition thereto, imprisonment, with or without hard labour (57 & 58 Vict. c. 41, s. 21); causing or allowing a child under eleven to be on licensed premises for the purpose of singing, etc., or offering anything for sale—penalty as before (*ibid.*).

[*Authorities.*—*Paterson's Licensing Acts*, 11th ed., by William Mackenzie; *Licensing Laws*, by Talbot.]



**Liege.**—See ALLEGIANCE.

## Lien.

### TABLE OF CONTENTS.

Lien . . . . .	418	Liens arising by Contract . . . . .	419
Possessory, Equitable, Maritime . . . . .	418	Waiver and Loss of Lien . . . . .	420
Possessory Lien : General or Particular . . . . .	418	The Nature and Rights of Lien . . . . .	421
Possession and other Essentials of Lien . . . . .	418	Vendor's Lien (Sale of Goods) . . . . .	421
Liens arising by Operation of Law . . . . .	419	Equitable Lien ; Lien of Trustees . . . . .	422
		Vendor's Lien (Sale of Land) . . . . .	422
		Vendee's Lien for Deposit . . . . .	422

Lien is the right in one man to retain that which is in his possession belonging to another till certain demands of him the person in possession are satisfied (*Hammonds v. Barclay*, 1801, 2 East, at p. 235). For convenience, the person to whom the property retained belongs is sometimes referred to as the debtor, the person retaining the property as the creditor. The word "lien" is, however, used also to denote rights given by equity and maritime law to creditors to have certain specific property primarily applied to the satisfaction of their demands. This latter class are called equitable and maritime liens respectively, and exist independently of possession. In the rules that it applies equity as regards liens follows the law ; the principal claims in connection with which maritime liens arise are claims in respect of salvage, collisions, wages of seamen and masters, pilotage, bottomry, and respondentia bonds (see under these titles in other parts of this work).

A legal lien to distinguish it from the others is called a possessory lien. Possessory lien and maritime lien are discussed respectively in detail under the titles POSSESSORY LIEN, MARITIME LIEN ; and it is not intended here to do more than refer to the nature of lien, and the general principles of the law relating thereto.

Liens are either particular or general ; a particular, sometimes also called a specific, lien is the right to retain specific property in satisfaction of demands in respect of such specific property, and particular liens are encouraged by the law. General liens, on the other hand, are in respect of a general balance of account due, and not in respect of any labour, etc., spent upon the specific property retained by the creditor ; this class of lien the law discourages and looks upon with disfavour.

Accordingly, whereas a particular lien may arise in one of three ways—viz. (1) by operation of law, (2) by express contract, (3) by implied contract—such contract being implied either from the conduct of the parties in their dealings with one another, custom or usage, general lien can arise only by express contract or by virtue of such well-established custom as to amount to an implied contract or term of a contract.

**I. The Possession and other Essentials of Lien.**—For a lien to arise, the creditor must have taken the possession of the debtor's property lawfully, and if such possession is obtained by violence, misrepresentation, or fraud the creditor cannot claim a lien, even though had he obtained possession of the same rightfully and fairly a lien would have arisen. For a lien cannot be acquired by a wrongful act (*Madden v. Kempster*, 1807, 1 Camp. 12).

The possession must have been obtained in due course of business, nor may the nature of such possession be inconsistent with the terms of the contract, express or implied, under which the lien is claimed. Where goods are deposited with the creditor for some special purpose and subsequently

retained by him upon failure of such purpose, he cannot claim a lien, for the property in the goods again returns to the debtor. But if after the purpose has failed the property is left by the debtor in the creditor's possession for so long a time as to make it equivalent to a deposit for general purposes, the lien will attach. Accordingly, if in the general course of dealing, a client from time to time hands papers to his solicitors, and does not take them back when the purpose for which they were handed is at an end, the conclusion is that they are left upon the general account, *e.g.* if deeds are handed over to the solicitor to raise money and no money having been raised they are afterwards permitted to remain in his hands, the lien will attach.

The possession must also be of a continuous and uninterrupted nature. See the leading case of *Kruger v. Wilcox*, 1753, Amb. 252; Tudor's *Leading Cases in Mercantile Law*, 353; and for the general principles, *Forth v. Simpson*, 1849, 13 Q. B. 680.

II. The cases where a particular lien arises by operation of law may be shortly subdivided into three main heads, viz.: (1) Where the creditor is compellable by law to receive the goods or to perform certain services to the owner of such goods. The commonest instances of this class of lien are the liens of carriers and innkeepers. For details, see CARRIER; INNKEEPER; and see *Robins & Co. v. Gray*, [1895] 2 Q. B. 501.

(2) Where the creditor has spent money, skill, or labour on the property, and claims in respect of his outlay. The commonest instances are the lien of artificers and solicitors. For details as to the law on solicitor's lien, see SOLICITOR. In these instances when the work is finished, the goods may be retained until such work is paid for. But the artificer, etc., has no lien if the work has been executed voluntarily, *i.e.* possession of the goods for the purpose of repairing them, etc., must have been taken with the consent and authority of the owner; there can be no such lien in respect of voluntary exertions. It is also an essential that the work should be completed, unless the completion of such work is prevented by the owner of the property.

In the cases of salvage or rescuing ships at sea, a lien was by the common law given to the salvor. But this right of lien has been considerably cut down by statute, and the law of particular lien as to salvage is now regulated by the Merchant Shipping Acts. See MARITIME LIEN.

It has been already said that the law does not favour general liens, and accordingly, unless established by express or necessarily implied contract, general liens can be established by custom only: the custom may be local. A custom in a particular trade must be strictly proved, and mere evidence of the popular opinion of the members of that trade, that such a right exists or ought to exist, is not enough to establish the custom. The evidence to establish it must go to prove that the custom was universally acquiesced in and known to everybody in the trade, or at all events is ascertainable to anyone taking ordinary care. The incidents are thus stated in *In re Spotten, Ex parte Provincial Bank*, 11 Ir. Rep. Eq. 412: "It must be shown as a matter of law, first, that it was a certain usage; second, that it was a reasonable usage, not inconsistent with law; third, that as a matter of evidence it should be shown that it was so universally acquiesced in that everybody in the trade knew it, or that it could be ascertained if he had taken the pains to inquire."

Instances of trades where a general lien occurs are factors, wharfingers, dyers, and bankers. Solicitors have also a general lien on deeds, documents, and muniments. For further details, see SOLICITOR; FACTOR; etc.

*As to Lien (whether particular or general) arising by Contract.*—A lien created by implication of law may be enlarged or modified by express contract, and the right of lien may be given similarly by contract where,

if reliance were placed on the implication of law alone, no lien would exist. On the other hand, the parties may contract themselves out of their right to lien by entering into an agreement the terms of which are inconsistent with the right. And usage of trade cannot be set up against a specific contract in clear terms. Where parties contract for a particular time or mode of payment, a claim for lien inconsistent with the terms would not be allowed. Similarly, liens are inconsistent with an acknowledged system of dealing on credit, and can only subsist where payment is to be made for ready money, or there is an agreement, express or implied, that the debtor shall give security to the creditor as soon as the claim arises. "If a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security excludes lien, and limits their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum*" (per Lord Westbury in *In re Leith, Chambers v. Davidson*, 1866, L. R. 1 P. C. at p. 305; 36 L. J. P. C. 17).

III. *How the right of Lien may be extinguished.*—The right may be lost or waived, either expressly or voluntarily, by implication. The right being, as we have seen, inseparably coupled with possession, it is obvious that the loss of possession results in the loss of the lien. But the right will not be lost if possession of the goods has been given to a bailee for safe custody or a like purpose. On the other hand, so stringent is the law as to possession, that where a creditor fraudulently procures the goods to be taken in execution, the nature of the possession having been changed, the right of lien is thereby lost. As a rule, unless the loss of possession be involuntary, the lien once lost does not reattach on possession of the goods being regained by the creditor; the rule, however, is subject to certain exceptions in respect of certain trades, *e.g.* policy brokers. (See BROKER; FACTOR.)

A release of the debt in any way (*e.g.* signing a composition deed) or tender by the debtor of the amount of the claim in respect of which the lien exists deprives the creditor of his lien. In the same manner the taking by the creditor of a security payable at a *distant* date is held to be inconsistent with the right of lien, and will deprive the creditor of such lien. The question to be determined for deciding whether the taking of a security deprives the creditor of his right of lien is one of intention, *viz.* was the security intended to be cumulative or substitutional? The presumption of intention will not be the same in all trades and professions. The rule has recently been stated by Lindley, L.J., that in every case where you have to consider whether a lien has been waived, you must weigh all the circumstances of that particular case. "Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case. In this particular instance we are dealing with a solicitor and his client. It strikes me that if a solicitor takes from his client such a security" [a joint and several promissory note by the client and her husband] "as this solicitor took, the *prima facie* inference is that he waives his lien. That appears to me the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do. In the case of a banker I should not draw the same inference, since a banker has not a similar duty towards his customer" (*In re Taylor, Stillman, and Underwood*, [1891] 1 Ch. 590 at p. 597).

Accordingly, where a client who retained a solicitor to negotiate a loan on the security of a reversionary interest signs a document charging

that interest with the payment of the solicitor's costs, the acceptance of this security is the waiver of the right to a lien upon a document in the solicitor's possession (*In re Douglas, Norman, & Co.*, [1898] 1 Ch. 199; *Groom v. Cheesewright*, [1895] 1 Ch. 730). As to vendor's lien, see *infra*.

IV. *The Nature of Lien*.—The right of lien of a creditor is a purely passive right of retention, and cannot be enforced by sale. But this latter right to sell the property retained has been expressly conferred by the statute law in the case of innkeepers (see INNKEEPER), and in the case of solicitor's lien the Court may make an order declaring the solicitor entitled to a charge upon property recovered, and ordering that such costs shall be raised and paid out of such property (see SOLICITOR).

If a party is entitled to a lien on property in respect of a debt barred by the Statute of Limitations the lien will attach nevertheless; for it is the remedy, not the debt itself, that is discharged by the statute (per Lord Eldon in *Spears v. Hartly*, 1800, 3 Esp. 81; 6 R. R. 814).

A lien does not affect third parties (for details, see POSSESSORY LIEN and *Vendor's Lien, infra*).

V. *Vendor's Lien*.—The rights of an unpaid vendor in respect of goods he has sold are now clearly defined by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). The vendor is deemed to be unpaid when (a) the whole of the price has not been paid or tendered; (b) a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

The unpaid vendor who is in possession of goods sold by him is entitled to a lien until payment or tender in three cases—

- (a) Where the goods have been sold without any stipulation as to credit.
- (b) Where the goods have been sold on credit, but the term of credit has expired. •
- (c) Where the purchaser becomes insolvent.

It was at one time doubted whether the vendor could exercise his right of lien if he was in possession of the goods as agent or bailee of the buyer, but now the Act expressly enacts that the vendor may exercise his right notwithstanding that he is in possession of the goods as "agent or bailee or custodian" of the buyer.

The right of lien on the remainder is not lost by part delivery of the goods, unless such an intention can be gathered from the circumstances as to imply an agreement to waive the lien.

The lien is lost, however, by delivery of the goods to a carrier or other bailee for the purposes of transmission to the buyer without reservation of the right of disposal. For what is a reservation of such right, see SALE OF GOODS; BILLS OF LADING; and STOPPAGE IN TRANSITU.

The right of the vendor is not lost by reason only of his obtaining judgment or other decree for the price of the goods. The Act further provides as to third parties, that subject to its other provisions (see SALE OF GOODS; FACTOR) the unpaid vendor's right of lien shall not be affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto, with this exception, however viz. that where "a document of title" (see BILLS OF LADING; etc.) to goods has been transferred to any person as buyer or owner of the goods, and that person transfers the document to another, who receives it in good faith and for value, then the vendor's lien is subject to the transferee's rights, i.e. if the transfer is by way of sale, the lien is altogether defeated; if by way of pledge, the lien is postponed to the rights of the pledgee.

For details as to vendor's lien, see the titles above referred to.

VI. *Equitable Liens*.—An equitable lien, it has already been stated, exists independently of possession, and is in the nature of a charge owing its origin to a trust created by agreement, express or implied. The most frequent instances are: The lien of a vendor of land in respect of unpaid purchase money; of a purchaser of land for his deposit; the lien of a trustee on the trust property in respect of his costs and expenses; and lastly, the lien that attaches to the property of a *cestui-que trust* in respect of breaches of trust committed by him. The leading case on vendor's lien for unpaid purchase money is *Mackreth v. Symons*, 1808, 15 Ves. 329; 10 R. R. 85 (and see 2 White and Tudor, 7th ed., pp. 926 *et seq.*), which laid down the rule that the vendor has a lien for purchase money unpaid against the vendee, volunteers, and purchasers with notice or having equitable interests only claiming under him, unless such lien be clearly relinquished, and that a security taken may be evidence under certain circumstances of such relinquishment, but the burden of proof is on the purchaser. The phrase "unpaid purchase money" includes for the purposes of the rule not only the whole of the purchase consideration if unpaid, but also any part thereof remaining unpaid. And the lien attaches as soon as the purchaser or persons taking under him as above mentioned has or have been let into possession independently of whether the conveyance has been executed or not.

The lien attaches to land of any sort—freehold, copyhold, or leaseholds, and has been extended to plant and machinery affixed (*In re Vulcan Iron Works*, 1888, W. N. 37; *In re Kidd*, [1894] 3 Ch. 558). Unlike possessory liens, the equitable lien of a vendor is barred by the Statutes of Limitation, being within sec. 8 of 37 & 38 Vict. c. 57 and sec. 40 of 3 & 4 Will. iv. c. 27 (see *Toft v. Stephenson*, 1848, 7 Hare, 1; 1 De G., M. & G. 28 (a case decided under the older Act)). And as to when the time commences to run against the vendor, see the same case (1854) in 5 De G., M. & G. 735.

A vendor of land in a register county, part of whose purchase money remains unpaid, is under no obligation to register a memorial of the vendor's lien, but is entitled to rely on his equitable lien against sub-purchasers who have notice of it, actual or constructive (*Kettlewell v. Watson*, 1884, 26 Ch. D. 501). As to deeds executed after 31st December 1881, the Conveyancing Act, 1881, enacts that a receipt for consideration money or other consideration in the body of the deed or indorsed thereon shall, in favour of a subsequent purchaser, without notice that such money or consideration was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount.

Vendor's lien for the purposes of LOCKE KING's and the amending Acts is a mortgage on the property, and a devisee of land subject to a vendor's lien takes it charged with the payment of unpaid purchase money. See for a recent case, *In re Kidd*, *ubi supra*.

The unpaid vendor of land taken by a railway company has the same lien as in the case of a sale to a private individual, and can enforce his lien in the same way. See *Allgood v. Merrybent and Darlington Rwy. Co.*, 1886, 33 Ch. D. 571, as to this lien and the vendor's rights.

The purchaser as well as the vendor has a lien. This lien is in respect of deposit or instalments of purchase money, and attaches on the land of the vendor who does not complete (*Rose v. Watson*, 1863, 10 H. L. 672).

But the purchaser cannot enforce his lien or recover his deposit if the purchase go off by his own default, even if a defect in the vendor's title be subsequently discovered (*Soper v. Arnold*, 1889, 14 App. Cas. 429).

Generally, the same rules apply as to the manner in which an equitable lien may be waived or lost as have been already noticed in dealing with lien; if part of the estate is mortgaged this, of course, is very clear evidence of intention to exclude lien.

The subject of the lien of trustees for their costs and expenses on the trust estate and the lien attaching to property of a beneficiary who has committed a breach of trust is more properly dealt with under the law of trusts. See TRUSTS.

See POSSESSORY LIEN; MARITIME LIEN; VENDORS AND PURCHASERS; INN-KEEPER; FACTOR; CARRIER; SOLICITOR; BANKER AND CUSTOMER, vol. i. p. 481.

**Lieu and Substitution.**—See IN LIEU OF; INSTEAD OF.

**Lieutenancy, Commission of.**—While the old Acts for the defence of the realm, such as the Assize of Arms (27 Hen. II.) and the Statute of Westminster (13 Edw. I. c. 6), continued in force, commissions were issued to officers called Commissioners of Array, who went into every county for the purpose of arraying and summoning those liable to service, and punishing defaulters. In the time of Edward VI. commissions of lieutenancy, containing in substance the same powers as the old commissions of array, began to be issued to lieutenants of counties, who were appointed to array or lead, or both, the military forces, as the standing representatives of the Crown in military matters. After the reign of Mary these lieutenants were usually appointed, and became known as, Lords Lieutenant (*q.v.*).

See ARMY; MILITIA; LORD LIEUTENANT.

[*Authorities.*—Steph. *Bl.*, 11th ed., vol. ii. p. 596, and collections of commissions there cited; *Manual Military Law*, War Office, 1894, p. 213, quoting 4 & 5 Phil. & Mary, c. 2.]

**Lieutenant.**—See OFFICERS.

**Lieutenant of County.**—See LIEUTENANCY, COMMISSION OF.

**Life Annuities.**—See ANNUITIES.

**Life, Continuance of.**—A person shown to have been living at a given date is presumed to be still alive until a time considerably exceeding the ordinary duration of human life has elapsed, and the onus of showing such person's death lies on the party asserting it. If, however, evidence is given of a person's continuous unexplained absence, and the non-receipt of intelligence from or concerning him by those who naturally would hear of him, the presumption in favour of the continuance of his life ceases after the lapse of seven years, but the law raises no presumption as to the time of his death. In some cases, as, *e.g.*, where the party when last heard of was ill, or had since been exposed to extraordinary danger, death has been presumed before the expiry of seven years. See DEATH, PROOF OF.

[*Authorities.*—Taylor, *Evidence*, 9th ed., ss. 198-201; Best, *Evidence*, 8th ed., pp. 366, 367.]

## Life, Estates for.

## TABLE OF CONTENTS.

History . . . . .	424	Apportionment of Rent . . . . .	429
Definition . . . . .	424	Custody of Title-Deeds . . . . .	429
Life Estates arising by Act of Party . . . . .	424	Waste: Equitable Waste . . . . .	430
Life Estates arising by Operation of Law . . . . .	424	Permissive and Voluntary Waste . . . . .	430
Classification of Life Estates . . . . .	424	Leasing and other Powers of Alienation . . . . .	431
Creation of Life Estates, Wills Act . . . . .	425	Powers of Disposition of Estates <i>pur autre vie</i> . . . . .	431
Estates <i>pur autre vie</i> . . . . .	425	Statutory Powers of Alienation . . . . .	432
General Occupancy . . . . .	425	Settled Land Acts . . . . .	432
Special Occupancy . . . . .	426	Scope of the Acts . . . . .	433
Liability of Estate <i>pur autre vie</i> for Deceased Tenant's Debts . . . . .	426	Sales . . . . .	433
Rights and Liabilities of Tenants for Life . . . . .	426	Enfranchisements . . . . .	434
Improvements . . . . .	426	Exchanges . . . . .	434
Statutory Powers . . . . .	427	Partitions . . . . .	434
Estovers . . . . .	428	Leasing . . . . .	434
Emblements . . . . .	428	Charges . . . . .	435
Fixtures . . . . .	428	Determination of Life Estates . . . . .	436
		Production of <i>cestui-que vie</i> . . . . .	436

An estate for life is generally considered to be the greatest estate in land recognised by the law in the earliest times, and it was the estate most frequently granted by the lord to his tenant for his services. For the presumption was that lands were given to the tenant to enjoy so long as he personally could enjoy them, and even if expressly given to him and his heirs, the tenant had no power of alienation. His heirs took by force of the original grant or (to use the expression subsequently used in *Shelley's case*) by purchase, and the tenant had no more than a life estate. The incident of alienation, which later on was looked upon as a natural incident of freehold estates, was of slow growth; the history of the gradual acquisition of the power will be found under ESTATES; ESTATES OF INHERITANCE. We need only say here that alienation *inter vivos* was recognised by *Quia emptores* (Stat. 18 Edw. I. c. 1), and testamentary disposition of estates for life (*i.e.* the life of another) by the Statute of Frauds (29 Car. II. c. 3).

Estates for life, or in other words freeholds not of inheritance, are estates capable of subsisting for the term of a life or lives. They arise either by act of party or by law. Those that arise by act of party are estates created expressly by deed or will, and given to the donee to hold (1) for his own life, or (2) the life of another person—the latter estate is called an estate *pur autre vie*, and the person on the duration of whose life the estate depends is called the *cestui-que vie*; (3) for the joint-lives of several persons; (4) for the life of the longest liver of several persons.

Estates for life arising by operation of law are: (1) the estate for life which by the common law a widow has in a portion of her husband's lands upon his death, called "dower" (see HUSBAND AND WIFE); (2) the estate for life which, subject to certain requisites, a husband has in lands, whereof his wife was seised during the marriage (see CURTESY); (3) the estate for life of a tenant in tail after possibility of issue extinct (see ESTATES OF INHERITANCE, *Estates Tail*).

Some of the estates above enumerated may, as a fact, determine before the end of the life on which their existence depends (*e.g.* an estate of dower in gavelkind ceases on remarriage of the widow), and formerly a person became dead in law by becoming "professed" in religion (*Co. Litt.* 132). Hence the old practice of granting an estate for the *natural* life as contrasted with the *civil* life. But the law, looking only upon the capacity of the estate

to endure and not on its actual duration, treated them all as estates for life.

A term of years, no matter how far in excess of the possible duration of any life (e.g. 1000 years), granted to one if he shall so long live, is not an estate for life, and is less than freehold. And also in the eyes of the law, an estate for a man's own life is deemed greater than an estate for the life of another.

Having referred the reader to another part of the work for the other classes of estates for life, we will deal more fully with such estates created by act of party, viz.: (1) the estate of a tenant for his own life, called, for convenience, estate for life; (2) the estate of a tenant for the life of another, called estate *pur autre vie*.

*Creation.*—Even without express words of limitation (i.e. to A. for life), an estate for life is created by a grant to the grantee (i.e. to A. simply) without further words to qualify it. This rule holds good to this day as to grants *inter vivos*, but has been modified in the case of testamentary dispositions by the Wills Act, 1837, s. 28. The origin of the doctrine that restricted what *prima facie* appears to be a gift of property absolutely, i.e. a gift of land in fee-simple, to a gift for life only, is to be found in the old conception of rights in real property, as consisting in personal enjoyment without the incident of alienation or devolution (a conception already alluded to, and which will be found discussed at length under ESTATES; ESTATES OF INHERITANCE; HEIRS). But the Courts, even before the passing of the Wills Act, allowed any evidence of a testator's intention to confer something more than an estate for life to guide them in construing the gift according to such intention.

If a tenant for life alienates his estate, his alienee has an estate *pur autre vie*. And an estate *pur autre vie* may also be granted directly and in express words, i.e. to A. during the life of B. It will be convenient to deal with the anomalies of an estate *pur autre vie* before passing to the general law on estates for life. If the *cestui-que vie* survived the owner of the estate *pur autre vie*, a question arose as to who was entitled to the land during the rest of the life of the *cestui-que vie*. Clearly, the latter, even if he had been the original grantor of the estate, had no right to it, having parted with his interest therein. If the limitation was to the grantee and his heirs, or the grantee and his executors, his representatives would take. But most frequently the grant was to A. simply, and, accordingly, on his death the land belonged to the first comer that took possession. Such occupant of the land was called a general occupant; the heir, on the other hand, was called a special occupant. But though the Statute of Wills empowered owners of fee-simple lands to dispose of them by will, the tenant *pur autre vie* could not dispose of his lands; nor, on the other hand, were they after his death subject to his debts. Both these evils were remedied by the Statute of Frauds, which (29 Car. II. c. 3, s. 12) not only gave the owner of an estate *pur autre vie* power to dispose of it for the life of the *cestui-que vie* by his will, but enacted that in case of intestacy the heir as special occupant, or in default of a special occupant, the executors or administrators of the deceased should take the land subject to the payment of his debts. The surplus in this case, after payment of debts, is distributable, according to the Statute of Distributions, as personal estate. In other words, apart from any disposition to or occupancy by the heir, the law gives it to the executor or administrator. The present law on the subject is contained in the Wills Act, which reproduces in another form the provisions of the Statute of Frauds, as explained by the Act 14 Geo. II. c. 20.



The provisions of sec. 6 of the Wills Act (7 Will. IV. and 1 Vict. c. 26, s. 3) are that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold tenant right, customary or copyhold, or of any other tenure, whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of the Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

As to the question whether under a particular assurance the estate *pur autre vie* goes to a special occupant or is left to go to the personal representative by force of the statute, the principles for determining its devolution in this respect have been recently laid down by the House of Lords in *Earl of Mountcastle v. Moresmyth*, [1896] App. Cas. 158. An estate *pur autre vie* was created by the conveyance of a tenant for life's estate to the tenant for life and another, to hold to the use of themselves and their heirs with a declaration that all the estate and interest conveyed to the other person was conveyed to such person as trustee for an infant. It was held that the infant had an equitable estate *pur autre vie*, not an estate to him and his heirs, and that there being no "special occupant," the infant's estate on his death passed to his administrators under the section of the Wills Act already noticed. It was argued that the devolution of the legal estate in the trustee determined by some sort of attraction the equitable estate of the infant, *i.e.* because the grantee's heirs are named, therefore the infant's heirs must be deemed to have been named. The House of Lords held that there was neither reason nor authority for such a proposition. Such an estate passes to the executor, "unless it can be shown that the heir was named as special occupant, or at least was special occupant" (per Lord Herschell). "It is for those who say that it ought to go to the heir to show that there are some words in the creation of that equitable or legal estate *pur autre vie* which throw it upon a special occupant. It has long since been established that in determining the quality of an estate *pur autre vie*, that is, whether it goes to a special occupant or to the executor by statute, you look to the terms of the last conveyance of the estate, and not to the original grant. . . . If it is to go to the heir, my present impression is that express words are necessary, and that in a deed at all events the word *heir* must be used for the purpose of designating the special occupant" (per Lord Davey, at p. 165).

*Of the Rights and Liabilities of Tenants for Life other than the Rights of Alienation.*—The rights of tenants for life requiring consideration are their rights with regard to improvements, fixtures, and emblements, their liabilities, or in other words the restrictions on their right of use and enjoyment, are in respect to the commission of waste. The leading case on estates for life and their incidents is *Lewis Bowle's case* (11 Co. 79 b; Tudor's *R. P. & C. Cases*, 37).

1. *Improvements.*—The primary rule is that improvements, however permanent and beneficial, must be paid for by the tenant for life; but statute law has introduced a large number of exceptions in the case of lasting improvements, and apportioned the expenses between the tenant for life and those who after his death are to reap the benefit of such improve-

ments. The most important of the modern enactments to this effect are:—

(a) The Public Money Drainage Acts (8 & 9 Vict. c. 56; 9 & 10 Vict. c. 101) and the Amending Acts thereto, providing for the obtaining of advances from the Government for drainage purposes, and repaying such advances by rent-charges on the land. Some of these Acts were repealed, and all practically superseded by—

(b) The Improvement of Lands Act, 1864 (27 & 28 Vict. c. 114), which, together with the subsequent Acts as to "Limited Owners" Residences, 1870, and the Amending Act, 1871, and the Limited Owners Reservoirs and Further Facilities Act, 1877 (34 & 35 Vict. c. 84; 40 & 41 Vict. c. 31), greatly extended the definition of improvements. The enumeration of improvements contained in sec. 9 of the Improvement of Land Act, 1864, is, by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 30), extended so as to comprise as regards applications made to the Land Commissioners after the passing of the Settled Land Act all improvements authorised by the latter Act. These include drainage, irrigation, warping, sewage works, embankments, sea walls, inclosures, reclamations, farm roads, private roads, planting, cottages for labourers, farm servants, and artisans, mills and engine houses, reservoirs and the like, tramways, canals, docks, jetties, piers, markets and market-places, streets, roads, paths, and squares, water-courses, trial pits for mines, and the reconstruction, enlargement, or improvement of any of these works. The money required to defray these improvements under the Acts is raised with the sanction of the Board of Agriculture, to which (by the Board of Agriculture Act, 1889) the functions of the Land Commissioners of England have been transferred (52 & 53 Vict. c. 30). The rent-charge securing the repayment of the money provides for payment, by instalments extending over not more than twenty-five years, of the sum advanced, together with interest thereon at not more than five per cent., and is created by an order of the Board. A memorial thereof must be registered in the Land Registry Office (27 & 28 Vict. c. 114). It takes priority over all other charges (and it is for this reason important to make the necessary searches in this respect), and is personalty and assignable as personalty.

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), in which Act the word "tenant" is interpreted to mean the holder of land under a landlord, as well for lives as for years, gives to the tenant compensation by the landlord in respect of improvements, and further gives to the landlord power on paying such compensation, to obtain a charge in favour of the landlord, his executors, administrators, and assigns; see, for further details, TENANT-RIGHT. With regard to tenants of market gardens, similar rights are given to the tenants by the Market Gardeners Compensation Act, 1895 (58 & 59 Vict. c. 22). See MARKET GARDEN.

In addition to the various provisions above noticed, the provisions of the Settled Land Acts, 1882–1890, should be considered. The subject is, however, more properly dealt with under SETTLED LAND ACTS. Capital moneys under the Act may be applied in payment of any improvements authorised by the Act of 1882. To these the Settled Land Act, 1890, added (s. 13) bridges, the making of alterations in buildings reasonably necessary or proper to enable the same to be let, and the rebuilding of the principal mansion-house on the settled land, provided the sum spent in the latter case does not exceed one-half the annual rental of the settled land; and by the Settled Land Act, 1887, it is enacted that where any improvement authorised by the principal Act has been made, and a rent-charge has been

or may be created with the object of paying off moneys advanced for the purpose of defraying the expenses of the improvement, capital money expended in redeeming or otherwise providing for payment of the rent-charge, shall be deemed to be applied in payment of the improvement. Where the tenant for life in order to obtain a reduction of the rate of interest payable on money borrowed for improvements under the Act of 1864, causes the rent-charges to be transferred to an insurance society on payment to the original holders of a lump sum in consideration of their consenting to the transfer, the repayment of this sum to the tenant for life would not be an expenditure "in redeeming" the rent-charges or "otherwise providing for the payment thereof" within the provision above noticed (s. 1) of the Settled Land Act, 1887, and therefore ought not to be made out of capital moneys in the hands of the trustees of the settlement (*In re Verney's Settled Estates*, 1898, W. N. p. 18).

Sec. 29 of the Agricultural Holdings Act, already referred to, contains a very similar provision as to landlord's improvements, and paying of charges for the improvements. The most recent addition to the improvements on which capital moneys may be expended, enumerated in sec. 25 of the Settled Land Act, has been made by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70, s. 75 (6)), which enacted that such improvements, in addition to cottages for labourers, farm servants, and artisans, whether employed or not on the settled land, should include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

*As to Estovers, Emblements, and Fixtures.*—The law gives to every tenant for life as incident to his estate the right, unless it be excluded by express agreement, to take upon the land reasonable *estovers* or *botes* (*Co. Litt.* 41 b; 2 Blackstone, 122). These are of three kinds, viz.: (1) *housebote* (*œdificandi et ardendi*), i.e. wood for building and repairs, and also for fuel; (2) *ploughbote* (*arandi*), sufficient for making implements of husbandry; and (3) *haybote* (*claudendi*), sufficient for repairing fences: all of which must be reasonable. See for details, ESTOVERS.

*Emblements.*—"If a tenant for his own life sows the land and dies before harvest, his executors shall have the emblements or profits of the crops. . . . The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands, and also for the encouragement of husbandry" (2 Blackstone, *loc. cit.*). The same rule applies to tenants *pur autre vie* on the death of the *cestui-que vie*, or on the determination by act of law of any estate for life; for definition and details as to emblements, see GROWING CROPS. The doctrine of emblements extends to roots planted or "other annual artificial profit," that is to say, to products growing annually by the industry of man (*fructus industriales*), as opposed to *fructus naturales*, and is founded on the theory that the cultivator expects to be repaid for his labour. Accordingly it does not extend to fruit trees and the like things of a more permanent nature, nor in any case to more than one crop of any product. The Statute 14 & 15 Vict. c. 25 provides that where the lease or tenancy of any farm or lands held by a tenant at rack-rent determines by the death or cesser of the life estate, of a tenant for life, his undertenant, instead of claiming emblements, shall be entitled to hold until the expiration of the current year on the terms of the existing lease. See LANDLORD AND TENANT; and for details as to what are emblements or not hereunder, see GROWING CROPS.

*Fixtures.*—The rights of tenants for life and their representatives respecting fixtures are based on the same principle as their rights to emble-

ments—encouragement, and are a relaxation in their favour of the maxim *Quicquid plantatur solo solo cedit*. As to fixtures other than agricultural, the general rule is that such as are not for permanent improvement, but rather for the purposes of domestic convenience or ornament or for the purposes of trade, may be removed by the tenant for life and pass to his personal representatives after his death. But even such fixtures as these may be removed only if they have been annexed by the tenant for life himself; otherwise they go with the inheritance (see *Norton v. Dashwood*, [1896] 2 Ch. 497; *Hobson v. Serringe*, [1897] 1 Ch. 182; the latter as to trade fixtures).

"In regard to fixtures and claims to remove them, the law has regard to the relation of the parties. . . . As between landlord and tenant, the claim of the tenant to remove fixtures set up by himself is the most favoured; as between tenant for life and remainderman, the claim of the tenant for life to remove fixtures set up by himself is less favoured; and as between executor and heir, where both claim under the same owner, the claim of the executor to remove fixtures set up by the owner is still less favoured. . . . In considering any question of fixtures the important circumstances to be regarded are: first, the mode of annexation of the article and the extent to which it is united with the freehold; secondly, its nature and construction, as whether it has been put up for a temporary purpose or by way of permanent improvement; and thirdly, the effect its removal will have upon the freehold" (per Chitty, J., in *Norton v. Dashwood*, *loc. cit.* at p. 500).

As to agricultural fixtures, the common law rule was relaxed by the Act 14 & 15 Vict. c. 25, and now the rights of a tenant for life are governed by the Agricultural Holdings Act, 1883; and as to market gardens, by the Market Gardeners Compensation Act, 1895. The rights of tenant for life and remainderman under the Act are the same as the rights between landlord and tenant, so that it is not necessary to do more than refer the reader to that heading. See TENANT-RIGHT; FIXTURES; and the leading case, *Elwes v. Maw* (43 Geo. III.), 3 East, 38; 6 R. R. 523; 2 Smith, L. C. 183.

*Apportionment of Rent*.—Under the old state of the law if a tenant for life let the land on a lease for years and died during the currency of a quarter, his personal representatives were not entitled, nor indeed was anyone else, to the rent due from the quarter-day preceding his death to the day of such death. A remedy in this respect (as to leases in writing) was given by the Act 4 & 5 Will. IV. c. 22, but under the wider provisions of the Act 33 & 34 Vict. c. 35 (Apportionment Act, 1870) all rents and other periodical payments in the nature of income, "whether reserved or made payable under an instrument in writing or otherwise," are like interest on money lent to be deemed to accrue from day to day, and be apportionable in respect of time accordingly.

*Custody of Title-Deeds*.—A legal tenant for life is as of right entitled to the custody of the title-deeds as against the remainderman, and this right will not be taken from him by the Court except for strong reasons, *e.g.* gross misconduct on his part of such a character as to endanger the safety of such deeds, or in a case of the Court requiring the deeds for the purpose of executing certain trusts in relation to the property. The fact that the tenant for life lives abroad is no sufficient reason (*e.g.* Australia—*Leather v. Leather*, 1877, 5 Ch. D. 221). And now that equitable tenants for life have been given such extensive power of sale and leasing, and the title-deeds are an almost necessary incident of such a power, the Court has given the custody of title-deeds in certain cases, even to an equitable tenant for life,

*e.g.* upon his undertaking not to part with them without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions (*In re Burnaby's Estates*, 1889, 42 Ch. D. 621). And in a later case it was held that the powers and duties imposed on the equitable tenant for life "have raised a presumption in favour of his title to possession which did not before exist, and made it incumbent on the Court to provide that if the estate can be adequately protected by reasonable safeguards, an equitable tenant for life shall be let into possession" to personally exercise such duties and exercise such powers, unless there be urgent reason to the contrary. And as an ancillary right he is entitled to the custody of the title-deeds (*In re Wythes, West v. Wythes*, [1893] 2 Ch. 369). But the order letting the equitable tenant for life into possession does not necessarily carry with it the right to the custody of the title-deeds, *e.g.* where he has mortgaged his interest (*In re Newen, Newen v. Bawely*, [1894] 2 Ch. 297).

*Waste*.—The maxim *Sic utere tuo ut alienum non lædas* applies to the rights of use and enjoyment of a tenant for life, as it does to those of a tenant in fee-simple. But though the tenant in fee-simple has not to consider the results on subsequent holders of the estate enjoyed by him, the tenant for life having but a limited interest must; and accordingly there is upon his right of enjoyment and user of his land the restriction that he must do nothing to it or any part of it whereby in the eye of law the estate of inheritance in remainder on his life estate may suffer injury. "In order to prove waste you must prove injury to the inheritance" (per Jessel, M. R., in *Jones v. Chappell*, 1878, 20 Eq. 539, quoted as summing up the law in *Meux v. Cobley*, [1892] 2 Ch. 253, 263).

Tenants for life are therefore liable for waste; and to this general rule there are but two exceptions, viz.—(1) a tenant in tail after possibility of issue extinct is not liable, this exception being on the ground that his estate was originally one of inheritance; (2) a tenant for life whose estate has been expressly conferred without impeachment of waste (*Lewis Boule's case, loc. cit.*). But even in these two exempted cases the tenant for life may not commit waste of the description known as *equitable waste*, that is to say waste of a wanton and unconscientious nature, *e.g.* knocking the roof off the family mansion; cutting ornamental timber so as to destroy the beauty of the estate; opening mines, and the like. The doctrine of equitable waste was considered in *Baker v. Sebright*, 1879, 13 Ch. D. 179. "Courts of equity," said Jessel, M. R., "restrained a legal tenant for life unimpeachable for waste from committing some kinds of waste which are called equitable waste . . . because it was considered that, though he had legal powers, he was not using them fairly—he was abusing them so as to destroy the subject of the settlement" (see ORNAMENTAL TIMBER; WASTE). And the Supreme Court of Judicature Act, 1873 (37 & 38 Vict. c. 83), expressly provides that an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Waste may be either voluntary or permissive. Voluntary waste is where the injury is actively committed, *i.e.* by the destruction of or alteration of the property, such as pulling down buildings, cutting down trees which the law or special custom regards as "timber," turning meadowland into arable, and generally changing the nature of the property: for voluntary waste the tenant for life is liable. But he is not liable for permissive waste, which, as the name implies, is the injury caused by

omission only, e.g. allowing premises to get out of repair, unless an express duty to repair is imposed upon him by the instrument under which his estate is derived (*In re Cartwright*, 1889, 41 Ch. D. 532; *Dashwood v. Magniac*, [1891] 3 Ch. 306).

The doctrines of waste and equitable waste, and the remedies of the remainderman or reversioner in respect of waste, are treated of in detail under WASTE.

*The Powers of Leasing and Alienation of Tenants for Life.*—The treatment of this subject may most conveniently be divided into the powers independently of statute law and powers by virtue of statute law.

It will be convenient also, before proceeding further, to revert to estates *pur autre vie*. It has been already noticed that the special occupant of such an estate after the death of the tenant *pur autre vie* may be designated either by the instrument originally creating the estate, or by an instrument executed by the tenant *pur autre vie*. "It is to be observed, however, that the heir in such cases took as occupant, and not as deriving title through the original tenant. . . . The estate is consequently not one of inheritance" (*In re Michell*, *Moore v. Moore*, [1892] 2 Ch. at p. 96). Nevertheless the Legislature and the Courts have, with regard to the power of disposition and alienation of the estate *pur autre vie*, enforced a convenient analogy between estates *pur autre vie* and estates of inheritance, and have given effect to it with regard both to the capacity and incapacity of alienation by the first taker, with the result that where an estate *pur autre vie* is made the subject of successive limitations (as such estates can be made, e.g. to A. and the heir of his body during the life of C., called a quasi-entail) they have regulated the power of alienation of the successive takers as far as possible by analogy to the rules which govern similar limitations of an estate in fee-simple. The doctrines and the history of the law in this respect were very clearly stated by Fry, J., in *In re Barber*, 1881, 18 Ch. D. 624: "With regard to the power of disposition by the first taker, there is no doubt a material difference between an estate *pur autre vie* and an estate in fee-simple, because the first taker of an estate *pur autre vie* has the whole estate in him, and it might have been supposed that he could dispose of the whole. But nevertheless his power of disposition has been limited. By what? By the regard paid to the intention expressed by the settlor or donor that a particular person shall be the special occupant after the first taker. For that reason, and for that reason only, I think, a limitation has been put upon the first taker's power of appointing a special occupant. The analogy to which I have referred was enforced by sec. 12 of the Statute of Frauds, which made an estate *pur autre vie* devisable, but provided that the heir of the first taker, if he took the estate as special occupant, should hold it as assets for the payment of his ancestor's debts, though, of course, it was not strictly assets for that purpose. In the same way a series of decisions of the Courts have permitted the creation of successive limitations of an estate *pur autre vie*, quasi-estates for life, quasi-estates in tail, quasi-estates in fee in remainder, and quasi-executory devises over. They have permitted alienation by deed by the quasi-tenant in tail in possession, and they have gone further, and have allowed alienation by deed by the quasi-tenant in tail in remainder, with the concurrence of the quasi-tenant for life in possession, though, of course, the quasi-tenant in tail in remainder has in truth no estate. But the Courts have declined to allow alienation by the quasi-tenant in tail in remainder without the concurrence of the quasi-tenant for life in possession, at any rate so as to bar the remainder expectant on the

estate tail, though probably such an alienation might be held to create a quasi-base fee. They have disallowed dispositions by will by the quasi-tenant in tail in possession and by the quasi-tenant for life in possession, though, of course, both the quasi-tenant in tail in possession and the quasi-tenant for life in possession were in one sense absolutely entitled to the whole interest in the property; and yet the designation of the person who was to take afterwards as special occupant has been held sufficient to put a restraint on the first taker's power of disposition." Lord St. Leonards, in *Allen v. Allen*, proceeded upon the analogy between estates *pur autre vie* and estates in fee-simple, and said that "the analogy with fee-simple estates ought to be supported as far as it can be."

The restrictions above noticed would, of course, by their very nature, be inapplicable to an estate for a man's own life, and a tenant for his own life may, by the common law, sell, mortgage, or otherwise alienate his estate for life; but of course the estate alienated endures for the alienor's life only.

So far we have dealt with powers of alienation over the estate of a tenant for life in the case where the estate alienated is no greater than the estate for which the alienor held it, the alienee receiving in his turn no more than the class of life estate known as an estate *pur autre vie*. But by virtue of modern legislation with regard to settled estates and land, a tenant for life under a settlement has been empowered, though he is but a limited owner, to alienate in such manner that the inheritance may pass to the alienee. The powers that were subsequently given by statute were previously in many instances inserted by conveyancers as express powers in settlements; and express powers of sale, leasing, and the like were thus given to tenants for life or to the trustees of the settlement; these powers were very necessary for the proper management of settled estates, and where the powers were omitted or insufficient the parties were compelled to obtain the sanction and help of Parliament. The Settled Estates Act, 1877, passed to amend the law relating to leases and sales of settled estates, was the first of the statutes to greatly facilitate leases and sales, in that it substituted the authority of the Court (*i.e.* the Chancery Division of the High Court of Justice) for the authority of Parliament. The Act 19 & 20 Vict. c. 120, and its amending Acts (21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; 39 & 40 Vict. c. 30), for facilitating leases for twenty-one years, with certain restrictions, were all repealed by the Act of 1877 (40 & 41 Vict. c. 18). Among other statutory provisions that should be mentioned before dealing with the Settled Land Acts are Lord Cranworth's Act (23 & 24 Vict. c. 145), dealing with powers of sale and exchange, and the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), conferring power on tenants for life to convey the fee-simple on purchase of lands by railway and other companies.

But the most important provisions, superseding practically those we have referred to in this respect, are contained in the series of enactments known as the Settled Land Acts, 1882 to 1890. A tenant for life for the purpose of exercising the powers conferred by the Acts is defined as the person who is for the time being under a settlement beneficially entitled to settled land for his life,<sup>1</sup> but the same powers are given (s. 58) to (1) a tenant for years determinable on life not holding merely under a lease at a rent; (2) a tenant for the life of another not holding merely under a lease at a rent; (3) a tenant for his own or any other life, or for years deter-

<sup>1</sup> If two or more are so entitled as tenants in common, or as joint-tenants, or for other concurrent estates or interests, they together constitute the tenant for life.



minable on life whose estate is liable to cease in any event during that life, whether by expiration of the estate or by conditional limitation or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts, or any other purpose; (4) a tenant in tail after possibility of issue extinct; and (5) a tenant by the curtesy as well as other "limited owners" whose estates are more than life estates. Settlement, shortly defined, is for the purposes of the Act any instrument or instruments, whether made before or after the passing of the Act by virtue of which any land or estate or interest in land stands for the time being limited (= "settled land" under the Act) to or in trust for any person by way of succession. The object and scope of the Acts have recently been before the House of Lords. "The Act of 1882," said Lord Macnaghten, "differs from all previous legislation in regard to settled land. It proceeds on different lines, and it has a different object in view. The Settled Estates Acts did not confer or enable the Court to confer on a limited owner powers beyond those ordinarily inserted in a well-drawn settlement. They were no doubt very useful Acts in their way. An application to the Court at a moderate cost was made to serve the purposes of a private estate Act. But the Settled Land Act was founded upon a broad policy, and has a larger scope. A period of agricultural depression, which showed no sign of abatement, had given rise to a popular outcry against settlements. The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce, without doing away altogether with the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the Settled Estates Acts. In those Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the Settled Land Act the paramount object of the Legislature was the well-being of the settled land. The interests of the persons entitled under the settlement are protected by the Act as far as it was possible to protect them. They must be duly considered by the trustees or by the Court whenever the trustees or the Court may be called upon to act. But it is evident, I think, that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests" (*Lord Henry Bruce v. Marquess of Ailesbury*, [1892] App. Cas. 356-364).

The Settled Land Acts, therefore, and their important provisions are more properly the subject of separate treatment than as part of the law on the rights of tenants for life. Accordingly, we will here omit reference to any other provisions than those that confer powers of alienation on the tenant for life, and referring the reader for details to the title SETTLED LAND ACTS, will give only a short summary of such powers. They relate to sales, enfranchisements, exchanges, partitions, and leases of the land.

1. *Sales*.—The tenant for life may sell the settled land or any part thereof, or any easement, right, or privilege of any kind over or in relation thereto; the sale to be at the best price reasonably obtainable. But this is subject to the exception, which applies as well to leases and exchanges, that the principal mansion-house on any settled land and the pleasure grounds and parks and lands, if any, usually occupied therewith, must not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court. But where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park usually occupied therewith do not exceed together 25 acres, the house is not to be deemed a principal mansion-



house within the exception (Act of 1890, s. 10). Heirlooms settled with the land may be likewise sold, but not without the consent of the Court (Act of 1882, s. 37). The tenant for life may sell privately or by auction in one or several lots, and may fix reserve biddings and buy in.

2. *Enfranchisements*.—Where the settlement comprises a manor, the tenant for life may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, so as to effect an enfranchisement, and upon such sale may except or reserve or not all or any mines and minerals.

3. *Exchanges*.—The tenant for life may make an exchange of settled land for other land (but so that settled land in England shall not be given in exchange for land out of England) including an exchange in consideration of money paid for equality of exchange. The exchange must be made for the best consideration reasonably obtainable, and is subject to the exception already noticed as to the principal mansion-house, etc.

4. *Partition*.—Where the settlement comprises an undivided share in land, or the land is under the settlement held in undivided shares, the tenant for life may concur in making a partition, including one in consideration of money paid for equality. The partition, like the exchange, must be for the best consideration reasonably obtainable.

On sales, exchanges, or partitions the tenant for life may make restrictions with regard to the user of the land, mines, and the like, and can transfer incumbrances on land sold or given in exchange on other parts of the settled land so as to exonerate the former; and where money is required for the purposes of discharging incumbrances, he may raise the money so required and the amount required for costs of the transaction by either mortgaging the fee-simple or creating a term of years (Act of 1890, s. 11).

5. *Leases*.—The tenant for life may lease for ordinary or building purposes for terms not exceeding respectively ninety-nine years for building, sixty for mining, twenty-one for any other lease,—the lease to be by deed and take effect in possession not later than twelve months after date; it must reserve the best rent reasonably obtainable, having regard, however, to any fine taken (*Duchess of Sutherland's case*, [1893] 3 Ch. 169; cp. *Chandler v. Brodley*, [1897] 1 Ch. 315). The lease must contain a covenant for payment of rent by the lessee, and a condition of re-entry on non-payment of such rent within a time specified, not exceeding thirty days. The lessee must also execute a counterpart lease and deliver it to the tenant for life. With regard to particular kinds of leases—(a) *Building leases* must be partly in consideration of the erection or improvement, or an agreement to erect or improve buildings on the land leased; and a peppercorn or other nominal rent may be reserved for the first five years or less of the term. The rent where the land is contracted to be leased in lots may be apportioned. By the Settled Land Act, 1889, the tenant for life may in a lease or agreement for a lease give the lessee an option of purchase to be exercised within a period not exceeding ten years.

A grant of a public-house in consideration of a perpetual yearly chief rent of £40, and a sum of £8700 cash and covenants by the grantees within two years to expend £400 in substantial improvements, and to maintain upon the land buildings of the clear yearly value of at least double the rent reserved, is a lease for building purposes within the provisions of the Act (*In re Earl of Ellesmere*, 1898, W. N. 18).

(b) *Mining Leases*.—In mining leases the rent may be made to vary according to the acreage worked or to the quantity of minerals gotten or

made merchantable or carried away, and a fixed minimum rent fixed with or without power to the lessee to make up the deficiency in any specified period. The consideration in the case of mining leases may be the execution of, or agreement to execute, improvements by the lessee authorised by the Act (see *supra*, sub *Improvements*) or for mining purposes. The building and mining leases may, with the consent of the Court, be varied according to the circumstances of the district in which the settled land is situate. But all mining leases, unless a contrary intention be expressed in the settlement, are subject to the provision that part of the mining rent is to be set aside and invested as capital moneys, and the residue alone is to go as rents and profits. The proportion to be set aside is, where the tenant for life is impeachable for waste, three-fourths; in other cases, one-fourth.

The tenant for life has other leasing powers for special objects—these are, for giving effect to a contract by his predecessors, which lease if made, would have been binding on successors in title; for giving effect to a covenant for renewal or confirming a voidable or void lease, and he may accept surrenders and grant new leases; and, lastly, in the case of copyhold lands, a tenant for life may grant to copyholders licences for leasing. The restrictions as to the principal mansion-house in the case of sales and exchanges apply, as already noticed, to leases.

Generally speaking, with reference to the powers of alienation above noticed, it is only in the case of the principal mansion-house, parks, and heirlooms that the Court exercises any control over the tenant for life's power. The Acts, however, provide that when intending to make a sale, exchange, partition, lease, mortgage, or charge, the tenant for life must notify his intention by registered letter addressed to the trustees severally, and also to the solicitor of the trustees if he know of such solicitor. At the date of the notice given, the number of trustees, unless a contrary intention appear, must not be less than two; where there are no trustees, they should be appointed; but persons dealing in good faith with the tenant for life are protected, and are not concerned to inquire as to the giving of such notice; and in every transaction (*i.e.* sale, exchange, partition, lease, mortgage, or charge) the person dealing with the tenant for life in good faith is as against all parties entitled under the settlement to be conclusively taken to have given the best consideration that could be "reasonably obtained."

The powers under the Act of a tenant for life are not capable of assignment, release, or devolution by operation of law or otherwise, to an assignee of the tenant for life's interest, and any contract not to exercise them is void, and any prohibition or limitation against their exercise contained in the settlement is void; nor in spite of any provision in the settlement shall the exercise of any such power occasion a forfeiture.

We have already mentioned the express powers inserted in settlements with a view to conferring powers analogous to those of the Settled Land Acts. The powers given by the Act are expressed to be cumulative, and so as not to affect or abridge any in the settlement, and larger powers than those in the Act may be expressly given. But in case of conflict the powers of the Act prevail, and accordingly, "notwithstanding anything in the settlement, the consent of the tenant for life shall by virtue of the Act be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in the Act." Where the "tenant for life" consists of two or more (*supra*), the consent of one is sufficient (Act of 1884, s. 6).

As to the provisions as to tenants for life who are married women,

infants, or lunatics, see under SETTLED LAND ACTS ; HUSBAND AND WIFE INFANTS ; LANDLORD AND TENANT ; LUNACY.

*Determination.*—The natural determination of an estate for life is the death of the person on whose life it depends, *i.e.* the *cestui-que vie* in the case of an estate for the life of another, the tenant for life himself where the estate is for the tenant's own life. The only other way in which such an estate may determine is merger or surrender (see MERGER ; SURRENDER).

In the case of an estate *pur autre vie* it is possible that the estate might be prolonged after the death of the *cestui-que vie* to the detriment of the person having an interest expectant on the determination of such estate owing to there being no proof forthcoming of such death. Accordingly there was passed a statute (6 Anne, c. 18) for the more "effectual discovery of the death of persons pretended to be alive, to the prejudice of those who claim estates after their death." The effect of the provisions of the statute as to estates *pur autre vie* is that on affidavit made by the remainderman stating his *bona fide* belief that the *cestui-que vie* is dead, he may obtain an order for the production of the *cestui-que vie*, and if the person in possession neglects or refuses to produce the *cestui-que vie*, the *cestui-que vie* shall be taken to be dead, and the estate *pur autre vie* thereupon determines. For recent cases on the statute, see *In re Owen*, 1878, 10 Ch. D. 166 ; *In re Stevens*, 1886, 31 Ch. D. 320 (where the statute was held to apply to a person having an interest determinable on a life as well as one having an estate *pur autre vie* strictly so called); and *In re Pople*, 1889, 40 Ch. D. 589 (to a devisee in case of the death of another without leaving issue).

[*Authorities.*—Tudor's *Leading Cases in R. P.* ; Lewis Bowle's case ; Williams' *Law of Real Property* ; Goodeve's *Law of Real Property*, 4th ed. ; Edwards' *Compendium of the Law of Property in Land* ; Challis' *Law of Real Property*.]

## Life Insurance (or more properly Assurance).

### TABLE OF CONTENTS.

Agents . . .	446	Insurable Interest . . .	437
Amalgamation . . .	444	Insurers . . .	443
Arbitration . . .	439	Life Insurance Acts . . .	444
Assignment of Policy . . .	441	Medical Examination . . .	438
Bonus . . .	440	Mortgage . . .	442
Conditions . . .	438	Newspaper Insurance . . .	445
Contract, The . . .	438	Novation . . .	445
Definition . . .	436	Proposal . . .	437
Foreign Companies . . .	444	Return of Premium . . .	440
Gambling Act . . .	437	Settlements . . .	442
Government Assurance . . .	445	Surrender . . .	440
Guarantee Assurance . . .	440	Winding-up . . .	445

*Definition.*—The contract of life assurance is not, like that of fire insurance or marine insurance, a contract of indemnity, but is a contract by which the insurer "undertakes to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum—or certain equivalent periodical payments—by another." The event may be either the death of the assured, or his attaining a certain age, or his surviving or not surviving some other person. Contracts to pay annuities during the continuance of certain lives stand on a similar footing. These and other contingencies are now commonly provided for by policies of insurance, and

premiums to meet most conceivable risks are readily quoted by different insurance offices.

*Gambling Act.*—At common law there was formerly no limit to the chances which might be made the subject of insurance; and many gambling speculations were entered into under the name of insurances. This was considered to be contrary to public policy, and accordingly in 1774 the Gambling Act, 14 Geo. III. c. 48, was passed. It prohibits (s. 1) the making of any insurance "on the life or lives of any person or persons, or on any event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest; or by way of gaming or wagering."

*Insurable Interest.*—The interest must exist at the time when the contract is entered into, and must be pecuniary. A man is considered to have an insurable interest in his own life (*Wainwright v. Bland*, 1836, 1 Moo. & R. 481), and a married woman in the life of her husband (*Evans v. Bynoid*, 1869, L. R. 4 Q. B. 622). But a parent cannot make a valid insurance on the life of his child, unless he has a pecuniary interest in it (*Halford v. Rymer*, 1830, 10 Barn. & Cress. 724). So, in the same way, a child, who is of age and therefore not legally entitled to maintenance, has no insurable interest in the life of his parent. But if the interest is pecuniary, as in case of creditor and debtor, surety and principal, trustee and *cestui-que trust*, the policy will be upheld. The second section of the Act requires that there shall be inserted in every policy the name or names of the person or persons interested therein, and for whose use, benefit, or on whose account such policy is so made. And the third that "no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives." The right to recover is therefore limited to the amount of the interest at the time of effecting the policy (*Dalby v. India and London Assurance Co.*, 1855, 15 C. B. 365). The assured must value his interest at its true amount when he makes the contract. If he effects a policy far in excess of that amount, he may find that his premiums have been wasted. But offices do not, as a rule, take such objections unless they suspect fraud. If there is an insurable interest, sufficient to support the policy, at the time when the contract is made, its subsequent cesser will not vitiate the policy (*ibid.*). After the assured ceases to be beneficially interested, his assignee who never had an insurable interest may nevertheless maintain an action on the policy (*Ashley v. Ashley*, 1832, 3 Sim. 149).

*Proposal.*—Insurances are entered into on the basis of all facts material to each particular policy being disclosed to the insurer. These facts, as a rule, are known to the person proposing the insurance, and not in the first instance to the company which undertakes the risk. It is essential that all facts which are in fact material should be disclosed (*Lindenau v. Desborough*, 1828, 8 Barn. & Cress. 586). The proposer, however, is not bound to communicate what the insurer "actually knows" *alimule*, or "ought to know, or what he takes upon himself the knowledge of, or what he waives being informed of" (*Carter v. Boehm*, 1766, 1 Smith, L. C.). In practice, most policies are issued on the basis of a declaration signed by the proposer, giving answers to questions framed by the insurance company, for the purpose of eliciting information on such points as they think important. The forms of these questions vary greatly; and in some cases are much more searching than they are in others. If the answers state facts, they amount to warranties; and any misstatement of a fact so warranted, even if unintentional, is fatal to the policy, unless the fact so

misstated should be held to be immaterial (*Macdonald v. Lavo Union Assurance Co.*, 1874, L. R. 9 Q. B. 328; *London Guarantee Co. v. Fearnley*, 1880, 5 App. Cas. 916). If the proposer is not able to answer definitely as to any fact, his proper course is merely to state his belief about it. He is then protected, unless it can be shown that his belief was different from what he stated it to be. The answers in the declaration, however, may not cover all the facts material to be known; and if such facts are concealed the policy may be vitiated. Thus the non-disclosure of a serious illness of the person to be insured, though not specifically inquired about, may vitiate a policy (*Morrison v. Muspratt*, 1827, 4 Bing. 60; *British Equitable Co. v. Musgrove*, 1887, 3 T. L. R. 630). Among the facts which insurance companies and Courts consider to be most material are whether or not the life has been accepted or refused by other companies, and the name of the medical attendant who can give information as to the health of the life proposed. Thus where a man stated that he was insured by two other offices, but omitted to mention that several others had refused the risk, his policy was declared to be void (*Wainwright v. Bland*, 1836, 1 Mee. & W. 33; *London Assurance Co. v. Mansel*, 1879, 11 Ch. D. 367). So also a reference to a medical practitioner who could give no information of any value, instead of to the one who had really attended, was held to be illusory (*Huckman v. Fernie*, 1838, 3 Mee. & W. 505). The person who acts as the usual medical attendant, even if unqualified, is the one whose name should be given (*Everett v. Desborough*, 1829, 5 Bing. 503; 30 R. R. 709). Though, however, the name of the medical attendant must be truly given, it does not follow that the proposer thereby makes him his agent, so as to be bound by his answers.

*Medical Examination.*—After the written proposal has been filled up, it is the almost invariable practice of companies undertaking life insurances to require the person proposed to be examined by a medical practitioner on their behalf. He also usually puts various questions, sometimes verbally and sometimes in writing, for the purpose of satisfying himself as to the health and antecedents of the person to be insured. True answers to these questions must be given, as well as to those contained in the proposal form. If false answers have been given, the fact that the medical examiner might possibly have detected their untruth is no excuse. A policy issued in reliance on them may be upset.

*The Contract.*—If the proposal is satisfactory, the company decides to accept the contract and make the insurance. The contract itself need not be in writing. A document bearing a stamp is required by statute to be made out and duly executed within a month after receiving or taking credit for the premium (54 & 55 Vict. c. 34, s. 100). But the contract is operative as soon as the agreement is arrived at, which seems to be the time when the premium is offered to and accepted by the company or its authorised agent (*Canning v. Farquhar*, 1886, 54 L. T. 350). The circumstances, however, stated in the declaration must continue to be true at the time of the acceptance; otherwise the contracting parties are not *ad idem*, and there is no contract (see *Couturier v. Hastie*, 1856, 5 H. L. 673).

*Conditions.*—All policies are issued subject to conditions indorsed upon them. The terms of the conditions required by different companies, and by the same company at different times, vary greatly. Many cases have been litigated and decided in the Courts upon the words of particular conditions, and after some of these decisions the words used have been varied so as to meet or avoid the effect of the judgments so given. The tendency of

modern practice has been greatly to simplify the conditions inserted in a policy. One which is still and must always be insisted on is that requiring payment of the premium on given dates or within a limited time thereafter. If the premium is not paid within the stipulated time, the policy lapses, payment of the premiums being a condition precedent to the continuance of the liability (*Accy v. Fernie*, 1840, 7 Mee. & W. 151; *Phoenix Life Assurance Co. v. Sheridan*, 1860, 8 H. L. 745). If a policy should so lapse during the lifetime of the assured, it would probably be renewed on terms more or less easy, unless anything should have occurred to render him less insurable. But if he should die after the premium had become due, there would be no possibility of reinstating it unless the premium was paid within the days of grace prescribed by the condition on it. Some policies, but not all, now provide that in the event of death occurring during the days of grace, the premium may be paid out of the sum assured, so that the policy is thus kept alive.

Another usual condition is that the policy is avoided if the assured should die by suicide or by the hands of justice. This is founded on considerations of public policy, which discourages people taking advantage from their own felonious act (*Amicable Society v. Bolland*, 1830, 4 Bli. N. S. 194). The felon or those claiming under or through him ought not to benefit by his criminal act. But if the matter can be dealt with, so that he is not benefited, there is no legal reason why the policy should be avoided. In a case, therefore, where a wife was convicted of murdering her husband, who had insured his life in her favour, it was held that, though she could not benefit by or assign the benefit of the policy, the sum assured was payable to the husband's executors as part of his estate (*Cleaver v. Mutual Reserve Fund Association*, [1892] 1 Q. B. 147). If suicide should be committed by a person of unsound mind, the rule of public policy does not apply, and there would consequently be nothing to prevent payment of the insurance money, unless, of course, the condition were so worded as to prohibit it (*Howe v. Anglo-Australian Insurance Co.*, 1861, 30 L. J. Ch. 511). See further, LUNACY. There is frequently a further condition that if any third person has an interest in the policy, such interest shall not be prejudicially affected by the suicide of the assured. Such conditions are enforceable for the benefit of those interested (*Cook v. Black*, 1842, 1 Hare, 390; *Moore v. Wolsey*, 1854, 4 El. & Bl. 243).

Conditions are also common prohibiting the assured from doing things calculated to increase the risk, either (a) absolutely or (b) without the express consent of the insurers, e.g. formerly, travelling beyond the limits of Europe was absolutely prohibited, now it is generally permitted in civilised countries on payment of a small extra premium. After the insurance has been in operation for a few years this condition is commonly released. Persons intending to insure should, however, take care to ascertain the practice in this respect of the office whose policy they propose to take, as some offices were quite recently, and may still be, illiberal and old-fashioned in their ideas about it.

**Arbitration.**—Policies often contain a condition that any difference between the assured and the company shall be referred to arbitration. Parties may, if they choose, agree to refer their disputes to a tribunal of their own selection; and may agree that the amount payable under such a contract as insurance shall be so ascertained, as a condition precedent to bringing an action (*Scott v. Avery*, 1853, 5 H. L. 811). The condition in a policy is frequently so worded that no action can successfully be brought until the amount payable has been so ascertained. If an action should be

brought in spite of such a condition, it may now be stayed (under the powers given by the Arbitration Act, 1889 (52 & 53 Vict. c. 49, s. 4). The party objecting must satisfy the Court that such a mode of trial will be unsatisfactory. If fraud is alleged against him, that is usually a sufficient reason for ordering a trial in Court (*Minifie v. Railway Passengers Assurance Co.*, 1881, 44 L. T. 552); but if the party charged with fraud is satisfied to have the matter investigated by an arbitrator, it may be referred under such a condition (*Russell v. Russell*, 1880, 14 Ch. D. 471). See further article on ARBITRATION, vol. i. p. 298.

*Return of Premium.*—If the policy is void *ab initio*, by reason, e.g., of want of agreement between the parties, it may be set aside. In such cases the general rule is that, if no risk has attached, the premiums paid as consideration for the insurance are returnable (*Fowler v. Scottish Equitable Co.*, 1859, 28 L. J. Ch. 225); even though the failure of the policy may be due to the fault of the assured, as by reason of breach of warranty or non-fraudulent concealment (*Feise v. Parkinson*, 1812, 4 Taun. 640; 13 R. R. 710; *Anderson v. Thornton*, 1853, 8 Ex. Rep. 425). Any actual fraud on the part of the assured or his agent is fatal to his right to recover the premiums paid (*Prince of Wales Insurance Co. v. Palmer*, 1858, 25 Beav. 605). If once the risk has attached, the premium ceases to be returnable (*Furtado v. Rodgers*, 1802, 3 Bos. & Pul. 201; 6 R. R. 752).

*Surrender.*—Where the life insured has not fallen, but the policy has been kept alive for some time, all offices are willing to terminate their risk and accept the surrender of the policy in consideration of the payment of a less sum down. They have their own rules for calculating what the surrender value in each case may be. These are generally incorporated in the policy, and are binding on the assured, who in the absence of an express contract has no right to insist on surrendering his policy, and can only do so on such terms as the company will agree to. In case the insurance company is wound up, Parliament has provided rules for ascertaining the value of a policy (35 & 36 Vict. c. 41, Sched. 1); but while the company is carrying on its business these rules are not applicable in this country. In some others there are statutory regulations as to surrender at the wish of the assured; but our Legislature leaves this matter to be regulated by contract, or, where there is no express condition, by the practice of the particular company which issues the policy.

*Bonus.*—It is usual where a policy has been in force for some time, for the office out of its profits to give the assured a benefit or bonus. This either increases the amount payable on the policy where the life lapses, or is applicable in reduction of the future premiums. Policies under which the assured are entitled to a periodical bonus, according to the prosperity of the company which issues them, are called participating policies. It was at one time thought that the holders of such policies became partners in the company which granted them. But this idea is now obsolete. The policy-holder does not in reality get a share in profits, but merely a return of the excess premiums he has paid, above what would have been necessary if no bonus was promised (*In re Albion Life Assurance Society*, 1880, 18 Ch. D. 83).

*Guarantee Insurance.*—Insurance companies frequently undertake the obligations of sureties for the honesty or solvency of individuals, in consideration of premiums paid to them for so doing. Such contracts are termed insurances, and are contained in documents termed policies, and by reason of the Statute of Frauds (29 Car. II. c. 3, s. 4) must be in writing. Legally they differ from life insurances, in that innocent non-disclosure by

the proposer of facts which turn out to be material does not avoid the contract (*North British Insurance Co. v. Lloyd*, 1855, 10 Ex. Rep. 523; *Lee v. Jones*, 1862, 17 C. B. N. S. 482). Misrepresentations or fraudulent concealment of facts in order to bring about the contract do, however, of course, render it voidable. These policies are issued in pursuance of special proposal forms, and subject to special conditions applicable to the contract of guarantee (see article on GUARANTEE), and must be construed according to their subject-matter.

In some cases guarantee and life insurance are combined. Two policies are made out, one for the payment of a certain sum on the death of the insured, the other being a guarantee of his fidelity, etc. The joint policies can be and are granted in consideration of a premium less than would be charged if two entirely different policies had been issued in respect of different individuals. The company retain a lien on the life policy, and only assume liability under it when they have not had to meet a claim under their guarantee. Where the person assured continues honest and solvent, such joint policies are of course advantageous, as for a slight additional payment he secures the benefit of a life policy as well as the guarantee which he must have provided, and for which he must have paid a premium, in any case. The life policy, except so far as it is combined with and modified by the guarantee, is subject to the ordinary conditions.

*Assignment of Policy.*—Formerly a chose in action was not by law capable of being assigned. See ASSIGNMENTS OF CHOSSES IN ACTION. Equity, however, considered that agreements to assign such securities, as, for instance, policies of insurance, might be enforced. Policies consequently became ordinarily the subject of sale, mortgage, and settlement. Parliament at length recognised the desirability of giving a legal recognition and sanction for a usage which had become well recognised in business; and by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144, s. 1), any person entitled by assignment or other derivative consideration to a policy of life assurance, and possessing the right in equity to receive and give an effectual discharge for the moneys secured thereby, was enabled to sue at law to recover such moneys. There had previously been much discussion in Courts of equity as to whether in particular cases sufficient notice of assignment had been given to perfect the equitable title of the assignee. The Act rendered these discussions less frequent, by providing (s. 3) that no assignment of a life assurance policy should confer on the assignee or those claiming through him any right to sue until a written notice of the date and purport of such assignment should have been given to the company liable under the policy. The time at which such notice is received regulates the priority of all claims under any assignment (*ibid.*). A mere agreement in writing to execute an assignment is not, however, an assignment, and notice of such agreement does not give a title to the intended assignee in priority to that of the person who has possession of the policy (*Spencer v. Clarke*, 1878, 9 Ch. D. 137). So, also, a deposit of a policy is not an assignment (*Webster v. British Empire Co.*, 1880, 15 Ch. D. 169). The right to sue on life policies, which was given by this statute, was extended by the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25 (6)), to the assignee of any debt or other legal chose in action, where the assignment is absolute and in writing, and express notice in writing has been given to the person bound to pay. A policy of insurance may be so assigned (*Ex parte Ibbetson*, 1877, 8 Ch. D. 519). Under the latter Act the assignee can sue in his own name, while under the earlier one he might have to sue in the name of the assignor. Otherwise, as regards assign-



ments of life policies, the effect of both statutes is similar. An assignment cannot be made by mere delivery of the policy, even though the assignee subsequently pays the premium (*Howes v. Prudential Assurance Co.*, 1883, 49 L. T. 133). The assignee is entitled only to the rights which the assignor possessed, and takes subject to any equities, rights of set-off, and other defences to which at the time of the notice the policy was liable in his hands (*Mangles v. Dixon*, 1853, 3 H. L. 702; *Dormay v. Borrowdale*, 1847, 10 Beav. 335; *West of England Bank v. Batchelor*, 1882, 51 L. J. Ch. 199). As, when a policy is effected, fraud on the part of the proposer may vitiate it, so fraud on the part of the purchaser, in concealing material facts from the assignor, may vitiate a contract of assignment (*Brealey v. Collins*, 1831, You. 317; *Jones v. Keene*, 1841, 2 Moo. & R. 348). If the life assured has fallen, but both assignor and assignee are ignorant of the fact, a contract to assign the policy is void, and money paid in consideration of the assignment is repayable (*Strickland v. Turner*, 1852, 7 Ex. Rep. 208).

*Mortgage.*—One purpose for which life policies are frequently assigned is as security for money owed or borrowed by the assured. The policy is then either formally mortgaged by deed, or it may be merely pledged by deposit with the creditor, in order to secure repayment of the sum due. A delivery alone is not an assignment (*Howes v. Prudential Co.*, *supra*), but it confers a lien on the person who holds a policy for valuable consideration; and in this way policies can be and are made available as a security for temporary loans. Creditors have, as we have seen, an insurable interest in the life of their debtor, and are entitled to insure it, or to require him to do so, as collateral security for the debt. Insurance companies often make loans themselves, on the security wholly or in part of policies effected by the debtor with themselves. They are thus able to get both premium and interest on the money they have advanced, and are only at the risk of the difference, if any, between the loan and the amount insured for if the life should lapse. Policies taken out as security for an advance are, moreover, frequently surrendered or allowed to lapse when the loan is discharged. The business is therefore profitable.

A mortgage deed of a policy usually contains covenants not to vitiate the policy, and to keep it up by due payment of premiums. If the mortgagor remains solvent, damages for breach of these covenants can of course be recovered from him; but the usual cause of breach is his bankruptcy. The measure of damages for failure to perform the covenant is the value of the policy at the time of the breach, or, in other words, such a sum as the company would accept as a present payment in commutation of future premiums (*Ex parte Bank of Ireland*, 1880, 17 L. R. Ir. Ch. 507). If the value of the policy is less than the debt, the creditor may prove for the balance. If it exceeds it, the balance belongs to the estate. It was formerly thought that a mortgagee was entitled to retain any balance after payment of his mortgage in payment of his unsecured debts, in preference to other creditors (*Chauntler's Claim*, 1872, L. R. 13 Eq. 327, and cases there cited), but this decision has since been disapproved (*Talbot v. Frere*, 1878, 9 Ch. D. 568; *Christison v. Bolam*, 1887, 36 Ch. D. 223). Where the insurance has been effected by creditors, they are entitled to sell the policy, and so realise their security and discharge the debt. They may assign or abandon it to the assured, but unless they do, the ownership remains in them (*Ford v. Tynte*, 1872, 41 L. J. Ch. 758; *Lewis v. King*, 1875, 44 L. J. Ch. 259).

*Settlements.*—Life insurances are frequently entered into for the purpose of making provision for the family or friends of the assured

after his death. In cases where he has no realised property to vest in trustees, they are perhaps the most convenient form in which money can be settled. A policy, being only a chose in action, was formerly considered not to come within the purview of the Statute of Elizabeth avoiding voluntary settlements, and was therefore not liable to be affected by questions as to the solvency of the settlor. Under the present Bankruptcy Act, however, of 1883, s. 168, a chose in action is defined to be property, and therefore a settlement of a policy would be liable to be defeated by the insolvency of the settlor, unless it was a settlement made (a) before and in contemplation of marriage, or (b) in favour of a purchaser or incumbrancer for good faith and for valuable consideration, or (c) on or for the wife or children of the settlor of property which after marriage has accrued to him in right of his wife (s. 47). This section repeats in effect the provisions of earlier Acts. Settlement policies had been invented and in use for some time previously; and received statutory recognition by the Married Woman's Property Act, 1870. That Act was repealed and its provisions re-enacted, with variations, in 1882 (45 & 46 Vict. c. 75). This, by sec. 11, provides that "a policy of assurance effected by any man or woman on his or her own life, and expressed to be for the benefit of his wife or her husband or children, shall create a trust in favour of the objects named; and the moneys payable under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the assured, or be subject to his or her debts."

Since this enactment settlement policies have come into common use. And their effect has been several times discussed in Court. If the policy is expressed to be for the benefit of the wife and children of the assured, it seems to be now settled that they would take the fund as joint tenants (*Scyton v. Satterthwaite*, 1887, 34 Ch. D. 511; *In re Davies*, [1892] 1 Ch. 90). If, therefore, the settlor wishes the fund to go to his wife for life, with remainder to his children, this should be clearly expressed in the policy. Should the trusts fail, the money payable under a settlement policy becomes part of the residuary estate of the assured (*Cleaver v. Mutual Reserve Fund Association*, [1892] 1 Q. B. 147). Since the Finance Act, 1894, policies have been devised which, on the death of the settlor, are to secure the payment of the sum insured to his wife or children direct without making it part of his estate so as to be subject to the death duties. The validity of such provisions has not yet been judicially considered.

A policy may be also bequeathed by will generally or specifically (*Parker v. Bott*, 1839, 9 Sim. 385), or may be the subject of a donation *mortis causâ* (*Annis v. Witt*, 1864, 33 Beav. 619).

An assignment, settlement, or bequest of a policy, in the absence of express intention to the contrary, carries with it any bonuses which may afterwards be declared on it (*Roberts v. Edwards*, 1864, 33 Beav. 259). The assignee or legatee is entitled to the full benefit, and is not obliged to allow them to be applied in reduction of premiums (*Gilley v. Burley*, 1856, 22 Beav. 619; *Macdonald v. Irvine*, 1878, 8 Ch. D. 119).

*Insurers.*—Life insurances, like marine, were originally granted by individual insurers or underwriters. The first chartered company came into existence in this country in 1706, and now the business is entirely in the hands of companies. The principles of law are, however, unaltered, except where the companies are controlled by statute. In some cases the insurers simply issue policies for profit, but many companies now carry on their business on the mutual principle, by which the insurance fund

is formed by the premiums paid for insurance, and all the assured are quasi-partners in the business. The earlier companies were formed by charter or deed of settlement or had private Acts of Parliament; those more recently incorporated are under the Companies Acts. To these must be added FRIENDLY SOCIETIES (*q.v.*) and the Post Office, which insures lives under special parliamentary powers. The formation and powers of companies generally are discussed elsewhere (see COMPANY); but life insurance companies are subject to special statutory provisions.

*Life Insurance Acts.*—33 & 34 Vict. c. 61, Act of 1870; 34 & 35 Vict. c. 58, Act of 1871; 35 & 36 Vict. c. 41, Act of 1872. The object of this legislation is to secure that companies which undertake life insurances shall as far as possible be solvent and permanent, so that people shall not find the substratum of their security gone after paying premiums for years, and when their lives may be no longer insurable, or only insurable on much more onerous terms than they were originally. Every company established, or which has commenced to carry on the business of life assurance within the United Kingdom after August 9, 1870, must deposit in Court a sum of £20,000, to be invested in approved securities (Act of 1870, s. 3). If it transacts other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, which are to be carried to a separate fund, called the life assurance fund, which is to be treated as if the company carried on no other business (*ibid.* s. 4). The deposit is to form part of this fund (Act of 1872, s. 1), which is to accumulate until it amounts to £40,000 out of the premiums, when the original deposit may be returned (Act of 1870, s. 3).

By the Companies Act, 1862, s. 44, insurance companies are bound to publish, twice a year, a statement showing the amount of their called-up capital, their liabilities, and their assets; and every member and creditor of the company is entitled to a copy of such statement, and so can form his own opinion as to their position.

*Foreign Companies.*—Foreign companies frequently issue policies of insurance in England. They are not subject to the above statutory provisions, and unless there is an express agreement on the subject, are not considered to have contracted under the terms of English law. Ordinarily they can only be sued in the Courts of the country where the company is domiciled, that is, where it has its head office (see *Jones v. Scottish Accident Co.*, 1886, 17 Q. B. D. 421). Sometimes, however, such companies agree expressly to grant policies which are to be construed and enforced according to the law of the country where the assured resides. If they empower agents resident here to issue policies they thereby submit to our law (*Moloney v. Tulloch*, 1835, 1 Ir. Ex. 114; *Kelly v. London and Staffordshire Co.*, 1885, 1 C. & E. 47).

*Amalgamation.*—Before the Insurance Acts many instances had occurred in which insurance companies had ceased to carry on business by being dissolved or amalgamated with other companies, and many cases of hardship to policy-holders and other persons concerned had attracted public attention. A policy which has been some time current has acquired a recognised surrender value; but the sum which the company would pay in such a case is not the true measure of its value, when the company ceases to carry on its business. In such a case, this is the sum which would be required to procure a similar policy in another company whose rates and circumstances were similar to those of the dissolved company (*Bell's case*, 1870, L. R. 9 Eq. 706). The Act of 1870, s. 14, requires that all amalga-

tions or transfers of the life assurance business of one company to another shall be subject to the sanction of the Court, which can only be given after due notice to the policy-holders, and cannot be given if one-tenth of them in value dissent. A transfer or amalgamation does not necessarily relieve the shareholders of their liability to their creditors or policy-holders, in case the new company should fail to discharge them. In case of creditors, a distinct agreement to accept the liability of a new company in lieu of that already existing must be proved; otherwise the old company and its shareholders continue to be liable (*In re India and London Life Co.*, 1872, L. R. 7 Ch. 651). The creditor's right may, however, by contract, be only against a specific fund. In that case, if the fund is transferred, his claim against it is of course transferred too (*Dowse's case*, 1876, 3 Ch. D. 384). Policy-holders do not stand in quite the same position as creditors until their policies mature into claims.

*Novation.*—Many nice questions as to novation, *i.e.* whether the circumstances showed that a new contract had been substituted for the original one, so as to transfer the policy-holder to the new company, formerly were much discussed in our Courts. They can hardly occur again, as the Act of 1872, s. 7, provides that no policy-holder shall be deemed to have abandoned any claim which he would have had against the first company, or to have accepted the liability of the other company in lieu thereof, unless such abandonment and acceptance have been signified by some writing signed by him or his agent lawfully authorised.

*Winding-up.*—An insurance company may be ordered to be wound up, upon the application of one or more policy-holders or shareholders, upon its being proved to the Court that the company is insolvent, contingent and prospective liabilities under policies and annuity, and other existing contracts, being taken into account (Act of 1870, s. 21). Rules for valuing such liabilities are given in the schedule to the Act of 1872. Winding-up may also of course be agreed upon and carried out voluntarily as in the case of any other company. In such cases policy-holders would of course become creditors for the value of their policies. If any substantial number dissented, they could prevent a voluntary winding-up.

*Government Assurance.*—Life insurance policies are issued by other bodies besides insurance companies properly so called. First among these come FRIENDLY SOCIETIES, which form the subject of a separate article. The Government also, through the medium of the Post Office, grants annuities and life policies for small amounts, on conditions which are not onerous. The powers to undertake and manage this are contained in a series of eight Acts of Parliament, known as the Government Annuities Acts, 1829–1888. And the regulations for the time being in force are to be found in the *Post Office Guide* issued by that department. If the amount insured does not exceed £25, no medical examination is required previously to issuing the policy, though the assured is entitled to one if he likes. In case there is no examination, satisfactory evidence of health is required, and the policy is not absolutely complete and binding till three premiums have been paid; but part only of the sum insured is payable if death occurs sooner. Residence abroad is not prohibited.

*Newspaper Insurance.*—Proprietors of newspapers and other periodical publications frequently offer free insurances—generally against accidental injury, but sometimes against death—to subscribers to or purchasers of their papers. This offer is made simply for advertising purposes. The ordinary rules as to supplying proper information to the insurer, and so on, are not applicable to such cases; and such insurances might possibly be considered

as within the mischief aimed at by the Gambling Act. The question has not hitherto been discussed in Court. The practice has, however, been recognised by Parliament, as regards accident insurances, by imposing an *ad valorem* duty on all sums received as premiums on such insurances in lieu of the ordinary penny stamp required for each single policy (54 & 55 Vict. c. 39, s. 116). The newspaper proprietors usually cover their risks by reinsurance with some regular insurance company.

*Agents.*—Insurances are now frequently effected through the instrumentality of agents, and questions have often arisen as to the liability of insurers and assured consequent on the irregular acts of such persons. The insurers, being usually not individuals but corporations, must of necessity act through the instrumentality of directors and managers, who are agents with special powers, and unable to bind their principals beyond the limits of their authority (*Ernest v. Nicholls*, 1855, 6 H. L. 419). This authority is usually defined by the charter or articles of association of the company; but may also sometimes be inferred from its ordinary course of dealing, and from the nature of the office held by the agent (*Fowler v. Scottish Equitable Assurance Co.*, 1859, 4 Jur. N. S. 1169). The cases in which the authority of an agent most commonly comes in question in matters of insurance, are those where the proposal is brought about through an agent, or where the subsequent premiums are payable to him and not directly to the insurers. Most companies employ agents to obtain business for them. These agents are either paid by salary or by commission on insurances effected through their agency, and sometimes in both ways. Their duties and powers are usually defined, but not infrequently they think it desirable to exceed the strict limits of their authority. For instance, if an agent, professing to act for a company, accepts a premium on its behalf, the risk may attach before any policy issued (*Rossiter v. Trafalgar Life Assurance Co.*, 1859, 27 Beav. 377; *Mackie v. European Society*, 1869, 21 L. T. 102). So where knowledge is material, it is his duty to communicate what he knows to them, and his knowledge is theirs (*Bawdon v. London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 234). But an agent cannot bind his principals so as to alter the conditions of a contract of insurance, or revive a policy which has lapsed through non-payment of premiums (*Acey v. Fernie*, 1840, 7 Mee. & W. 151; *British Industry Co. v. Ward*, 1855, 17 C. B. 645). In such cases he exceeds the limits of his authority, and not being their agent for such purposes, does not bind his principals. They may, however, adopt the agent's irregular acts, and so make them their own and be bound by them; and may by their conduct estop themselves from denying his authority (*Wing v. Harvey*, 1854, 5 De G., M. & G. 265).

Cases have arisen frequently in America in which misstatements had been made in the proposal through the mistake or misconduct of the agent who negotiated the insurance; and it has been suggested that the assured was consequently not responsible for such misstatements. The companies in such cases have usually repudiated the authority of the agent, and said that in that matter he was not acting for them. The decisions have naturally not been uniform; but the general tendency has been to hold the companies and not the assured liable for the acts and representations of the agents so employed (see *May on Insurance*, ss. 132–153). Similar questions have, it is believed, been raised in this country, but they seem not to be reported. The *ratio decidendi* by the Court of Appeal in *Bawdon v. London, Edinburgh, and Glasgow Co.*, *supra*, would seem to show that the insurers would not successfully here take advantage of the act or default of the agent whom they employed to negotiate the insurance.

[*Authorities.*—See further Bunyon's *Law of Life Assurance*, 3rd ed., 1891; and compare articles on ACCIDENT, FIRE, and MARINE INSURANCE.]

**Life Peerage.**—The question whether the Crown could create a life peerage by patent arose in the *Wensleydale Peerage* case (1856, 8 St. Tri. 479). In that case the Crown was advised to create Sir James Parke, formerly one of the Barons of the Exchequer, Baron Wensleydale, with a place and voice in Parliament, by patent for life only. The patent was presented to the House of Lords, and after much debate was referred by them to the Committee for Privileges to consider and report. Eventually, in accordance with the report of the Committee, the House resolved and adjudged that neither the patent, nor the patent with the usual writ of summons to Parliament issued in pursuance thereof, could entitle the grantee to sit and vote in Parliament. In the course of the elaborate discussions which took place, the creation was supported on the authority of Coke and subsequent text-book writers, by precedents of creations for life in the fourteenth and fifteenth centuries (*ibid.* 645), of peeresses for life in the seventeenth and eighteenth centuries, and of creations for life with special remainders always treated as new peerages when they took effect. It was further contended that, even if the patent was invalid, the grantee was entitled to sit under the writ of summons, and would so acquire a hereditary peerage. On the other side, Coke's authority was attacked, and it was said that later writers only followed Coke. The alleged precedents were nearly all by the authority of Parliament, or grants to aliens and women incapable of sitting, or to persons already peers, or to members of the Royal Family. There was no precedent of a baron created for life with a seat in Parliament since creations by patent were introduced. If the right to create such peers ever existed, it had been lost by desuetude for four hundred years, in the same way as peerage by tenure and by the curtesy had fallen into desuetude. If the patent was bad, the grantee could acquire no rights under the writ of summons. Lastly, the House had jurisdiction to call the patent in question without any reference by the Crown, as matter of privilege, and in the exercise of their right to see that the House was properly constituted and exclude disqualified persons. The Crown acquiesced in the decision of the House by granting a few months later a new patent to Baron Wensleydale and the heirs male of his body. The House recognised that the Crown could confer the title and precedence of a baron for life only (*ibid.* 633) without a seat in Parliament. The Crown, however, has never purported to confer unparliamentary baronies on men, unless possibly in the case of a few foreigners and one or two holders of foreign titles (*ibid.* 529, 573). It may be doubted if they could be regarded as grants of peerage conferring the privileges of peerage, and are not rather to be considered as mere courtesy titles. In the case of the *Countess of Rivers*, created by patent for life, it was held during the Commonwealth that she was not entitled to freedom from arrest, "for she never had reference to the Parliament or to do any other public service" (Styles, 254). This appears to be the only case in which life creations in favour of women have come under discussion. The statutory Lords of Appeal in Ordinary now sit in Parliament for life with the rank of baron, and take precedence among the other barons according to the dates of their creations. The form of their creation is, however, different from that of other barons (see HOUSE OF LORDS), and it appears questionable, though the point is never likely to arise, whether they would be entitled to trial by

peers. Their children have recently been granted precedence after the younger children of barons.

### **Life Salvage.**—See SALVAGE.

**Life-saving Appliances.**—These comprise life-boats, life-rafts, life-buoys, life-jackets, etc., and are required by statute for use either at sea or on the sea-coast.

In the former case the Board of Trade may make rules classifying British ships according to their employments and voyages, and the number of persons they carry; specifying the number and description and mode of construction of boats and life-saving appliances to be carried by British ships according to their classification, the equipments to be carried by the boats and rafts, and the methods to be provided to get the boats and life-saving appliances into the water, among which oil for use in stormy weather may be included; and prescribing the quantity, quality, and description of buoyant apparatus to be carried on board British ships carrying passengers, either in addition to or in substitution for the boats and life-saving appliances; all such rules, when made, are to be laid before Parliament, and to lie for forty days before both Houses before coming into operation, when they become part of the Act; but they do not apply to registered fishing-boats (M. S. A. 1894, s. 427). The owner and master of every British ship must see that his ship is provided, in accordance with such rules, with such appliances as are best adapted to secure the safety of her crew and passengers, having regard to the service in which she is employed, and the keeping of her deck free from undue encumbrance (s. 427). The Board of Trade may appoint a committee for preparing and advising on such rules, which shall be constituted of three shipowners selected by the Chamber of Shipping of the United Kingdom; one shipowner selected by the Shipowners' Association of Glasgow; one shipowner selected by the Liverpool Steamship Owners' Association and the Liverpool Shipowners' Association conjointly; two shipbuilders selected by the Institution of Naval Architects; three persons practically acquainted with navigation, by the shipmasters' societies recognised by the Board of Trade for this purpose; three persons, being or having been able-bodied seamen, selected by seamen's societies, similarly recognised by the Board; and two persons selected conjointly by the Committees of Lloyd's, Lloyd's Register, and the Institute of London Underwriters; but this constitution may be altered by Order in Council. Each member holds office for two years from the date of his appointment, but may be reappointed. The members receive travelling and other allowances out of the Mercantile Marine Fund, fixed by the Board of Trade (s. 429, and Sched. 17).

If a ship proceeds on a voyage unprovided with the life-saving appliances required in her case; or if any of the appliances with which she is provided are lost or made unfit for service in the course of the voyage through the wilful fault or negligence of the owner or master; or if the master wilfully neglects to replace or repair on the first opportunity any such lost or injured appliances; or if such appliances are not so kept as to be at all times fit and ready for use—the shipowner, if in fault, shall be liable for each offence to a maximum fine of £100, and the master, if in fault, to a maximum fine of £50. This provision does not prevent a person from being liable to other or higher fine or punishment under some other provision of the Act,

provided that he is not punished twice for the same offence; and if a person is charged with an offence punishable under such other provision, the Court may, if it thinks that proceedings should be taken under such other provision, adjourn the case for that purpose (s. 430). Ships may be surveyed by ship surveyors, who for that purpose have the powers of a Board of Trade inspector, to see if they are properly provided with life-saving appliances; if they find any deficiency they must give the owner or master written notice thereof, and the requisite remedy therefor; such notice is communicated to the customs officer of the port where the ship may require a clearance or transire, and the ship may be detained until a certificate be given by such surveyor that the ship is properly provided with life-saving appliances (s. 431).

The Act also provides that every emigrant ship must, if a foreign ship, be provided with (*inter alia*) four properly fitted life-buoys ready at all times for immediate use (s. 290). For the life-saving appliances required for fishing-boats, see sec. 375; FISHING-BOATS.

In the second case, viz. life-saving appliances on the sea-coast, or the life-boat service as it is known, which is defined to mean "the saving or attempted saving of vessels, or of life or property on board vessels wrecked or aground or sunk, or in danger thereof" (s. 742), the Act provides that the expenses of establishing and maintaining on the coasts of the United Kingdom proper life-boats, with the necessary crews and equipments, and of affording assistance towards preserving life and property in cases of shipwreck and distress at sea, and of rewarding the preservation of life in such cases, as the Board of Trade direct, are to be charged on and payable out of the Mercantile Marine Fund, so far as they are not paid by any private person (s. 677 (c)).

The function, however, of establishing and maintaining life-boats with the necessary crews and equipments on the coasts is actually performed by the Royal National Lifeboat Institution, a society incorporated in 1860, but which had existed from 1824 to 1854 under the name of the "Royal National Institution for the preservation of life from shipwreck," the funds of which have been and are provided by voluntary subscriptions and donations, and the administration of which is in the hands of a committee. Except between 1854 and 1869 the Institution has refused any assistance from the Mercantile Marine Fund. In 1897 a committee of the House of Commons, on complaints made against the general and financial management of the Institution, investigated the whole of its affairs and administration, and reported as follows: "The various local associations for the saving of life have almost entirely disappeared; and the Institution has 377 branches and owns over 300 life-boats. In 1896 it had an income of £117,000, of which £40,000 was derived from subscriptions, £16,000 from the Lifeboat Saturday Fund, £43,000 from legacies, £17,000 odd from dividends, its invested funds being over £600,000. The life-boats are manned by fishermen and beachmen, and their crews are not allowed to claim life salvage from ships, but are allowed to claim property salvage on any terms they can arrange with the shipowner (but this latter privilege will probably be abolished in accordance with the Parliamentary Committee's recommendation that the Institution and Lloyd's, conjointly, should frame conditions with respect to salvage of property, which should bind all life-boat crews; see SALVAGE). In forty-four years nearly 22,000 lives have been saved by the Institution, and nearly 40,000 rewards for saving life have been granted by it since its foundation in 1824." The committee found that the administration of the Institution had been economical, its material and appliances efficient and suitable, and the remuneration of the crews



adequate; and concluded that there was no ground for recommending that the life-boat service should be taken over by the State, in view of its efficient and successful maintenance by public benevolence, and that the thanks of the whole community were due to the committee of the Institution for the energy and good management with which for so many years, often in very difficult circumstances, it had carried out the national work of life-saving without reward or remuneration of any sort (*House of Commons Papers*, 1897, No. 317).

Further statutory provisions may be noticed in this connection. Harbour authorities may remove any wreck in waters under their control which is likely to become an obstruction or danger to life-boats engaged in life-boat service in those waters (s. 530); and lighthouse authorities have the same power (s. 531). The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. 27), also enacts that every harbour authority, unless the special Act otherwise provides, may not take any rates in respect of their harbour, dock, or pier before they provide, and always thereafter maintain in good repair, an efficient and well-appointed life-boat, mortars, rockets, etc., with the necessary tackle and competent crew to work it, for the assistance of ships in distress; and such appliances must be stationed at the most advanced works of the harbour, etc., or such place as the Board of Trade may approve, and be used when necessary. A penalty of £2 is imposed for every twenty-four hours that such appliances are not provided (ss. 16 and 17; 1862, 25 & 26 Vict. c. 69, s. 5).

**Ligan.**—See FLOTSAM, JETSAM, AND LAGAN.

**Light.**—Light, like air and water, is a provision of nature, for the general use of mankind, and essential to man's very existence. Like air and water, it flows over the land of one person to that of another for the use of both, and, to secure the due use and enjoyment of light by both, the law recognises mutual rights and obligations on the part of both, that each may be restrained from infringing the rights of the other and depriving him of them unjustly. It is obvious that the right of a landowner to unobstructed light across his neighbour's land must, if unrestricted and unlimited, at once come into conflict with the right of that neighbour to build near the extremity of his land, in such a way as to obstruct the light. The two rights could not coexist if unrestricted, and the law has therefore stepped in to define and determine the respective rights and obligations of neighbours. By limiting the otherwise absolute and natural right which one would have to all the light which would come to his land, and the absolute proprietary right of the other to build in any way he pleases, the law has so reconciled the two that both may be reasonably enjoyed by the respective owners. If the right to light were to be measured by the natural condition of things, it would be a right to all the light that would come from every direction, and whether to open ground or to a building with windows erected on the ground. There is undoubtedly a natural right to all the light that flows to open ground, but the law, limiting that right for the sake of the neighbour, will not allow it to deprive him of his proprietary right to build up to the edge of his land, until what is called a right to light has been acquired; and it is only when a building has been erected with windows or other apertures to admit light that such a restrictive right can be acquired against a neighbour's right to

build (*Roberts v. Macord*, 1832, 1 Moo. & R. 230; *Potts v. Smith*, 1868, L. R. 6 Eq. 311). But it is not even in every case in which a building has been erected that the owner is allowed a right to prevent his neighbour building also in such a way as to obstruct the light. Such a right is not to be snatched against a neighbour, and, at all events at common law, it is only in those cases in which the neighbour has granted a right to have the light unobstructed that such a right can be claimed. As a matter of fact, actual grants of rights to light, as they are called, are rarely to be met with; but by fiction of law, grants are frequently implied from circumstances and from the acts of the presumed grantor (see GRANT), and they are always implied in the theory of prescription (see PRESCRIPTION), which is based on the presumption of an ancient grant. When a building with a window to which the light crossing the neighbour's land has had access, has existed for so long a time that a right to light has been acquired by prescription, the right is commonly designated an ancient light (see ANCIENT LIGHTS). This right at common law could only be acquired if, to use the technical phrase, the light had been enjoyed for time whereof the memory of man runneth not to the contrary, which meant ever since the beginning of the reign of King Richard I.; but by the Prescription Act the requisite period of enjoyment for the acquisition of a right to light was reduced to twenty years before some suit or action in which the claim to the right shall have been brought into question (see PRESCRIPTION), and it has been held by the House of Lords that this statutory prescription has entirely superseded prescription at common law in the case of rights to light (*Tapling v. Jones*, 1865, 11 H. L. 290). In that case Lord Westbury, L.C., laid it down that the right to what is called an "ancient light" now depends upon positive enactment; that it is matter *juris positivi*, and does not require, and therefore ought not to be rested on, any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor, and thus the need for presumption of a grant as at common law was abrogated.

It is the undoubted right of every owner of a house to open any and as many windows as he thinks fit for the admission of light and air, even though the house closely adjoins a neighbour's land and the windows receive the light crossing it; and, as it was stated above, there is a common law right to all the light that will come. As, however, the adjoining owner has no right of action for the opening of such windows, and as after twenty years' enjoyment of light a right to light would be acquired against him, some means of preventing the acquisition of a right to unobstructed light is required, and the only means is for him to build on his own land and prevent the enjoyment of the light. Frequently a timber screen is erected for the purpose. This right to build and obstruct has sometimes been termed his right to obstruct, but the inaccuracy of the expression was pointed out by Lord Westbury, L.C., in *Tapling v. Jones* (*supra*), who explained that if a man builds and opens numerous windows overlooking his neighbour's garden, the latter acquires no new right from that act, but has simply the same right to build that he possessed before.

An important question relating to rights to light is the effect of increasing the size of ancient windows, and of opening new ones so near that the new portions of the former and the new windows cannot be obstructed without also obstructing the ancient lights. Can the servient owner obstruct the ancient lights, or must he submit to a more extensive right being acquired against him? In *Tapling v. Jones* (*supra*) it was decided that as the owner of the ancient lights had done no wrong, his

right was not affected, and that the servient owner could not therefore justify the obstruction of any ancient light while obstructing the increase or the new window.

Questions of acquisition of rights to light by implied grant have frequently arisen in cases where an owner of land and of a house adjoining, having windows overlooking the land, has severed the house from the land by sale or by will. This may be done in either of three ways—he may sell the house and keep the land, or he may sell the land and keep the house, or he may sell the two simultaneously to different persons. In the first case he may not build on the land and obstruct the light, as he would be presumed to have intended to grant a right to light for the windows of the house he was selling, and to obstruct the light would be in derogation of his grant (*Coutts v. Gorham*, 1829, Moo. & M. 396; *Beddington v. Atlee*, 1887, 35 Ch. D. 317). In the second case the purchaser of the land may obstruct the windows, for no such grant can be implied against him as against the vendor in the first case, and if the vendor had intended to reserve a right to light he should have done so in express terms (*Booth v. Alcock*, 1873, L. R. 8 Ch. 663). In the third case, like the first, there is a presumption of a grant of right to light (*Palmer v. Fletcher*, 15 Car. II. 1 Lev. 122). The rules are the same if the severance is effected by will (*Phillips v. Low*, [1892] 1 Ch. 47).

Many questions have arisen as to the extent of a right to light, and the alteration of windows for improvement and increase of enjoyment of light, which cannot be discussed here, but the general rule is that an owner of a right to light may improve his enjoyment if he can, for he does not thereby impose any greater burden on the servient tenement.

The last topic to be noticed is the loss of a right to light. This may be effected by release, which may be presumed, or by abandonment by non-user, which in fact involves a presumption of a release. It has been thought that as a right can only be acquired by twenty years' user, it can only be lost by non-user for twenty years; but this is not so, for if an owner of a right to light manifests such an appearance of having abandoned his right as to induce another person to believe that he has done so, and the latter is induced to act on such belief, the former would be precluded from denying abandonment, even though less than twenty years' non-user may have occurred (*Stokoe v. Singers*, 1857, 8 El. & Bl. 31; *Moore v. Rawson*, 1824, 3 Barn. & Cress. 332; 27 R. R. 375).

[*Authorities*.—Goddard on *Easements*; Gale on *Easements*.]

**Lighthouse.**—"At common law the Crown only could erect beacons, lighthouses, and seamarks, and this was ever done by commission under the Great Seal; but by letters patent the Lord Admiral (among others) had power to erect beacons, seamarks, and signs for the sea. The money payable for maintenance and watching of beacons was called beaconage" (and a similar payment in respect of buoys was called buoyage) (Coke, *Inst.* iv. 148, 149). By stat. 8 Eliz. c. 13 (1565), repealed in 1864, the Trinity House was empowered to erect marks and signs for the sea in places on the seashore and the uplands near the seacoast; and this was held (*temp.* James I.) to include lighthouses by night as well as beacons by day (*ibid.*). The first lighthouse put up by the Trinity House was at Caistor in Norfolk in 1600 (*M'Culloch, Dictionary of Commerce and Navigation*).

The legal history of lighthouses and beacons is thus succinctly described: "Lights and beacons were at one time almost universally private property."

Persons ejected beacons or lighthouses where they were required, and those who navigated the seas, at first perhaps voluntarily, and afterwards by compulsion, paid tolls in respect of them. Rights gradually grew up; rights recognised by law, and rights enforced, it may be, by charters or by Acts of Parliament. With the gradual development of those rights it became necessary at last to bring all those lighthouses and beacons under one general authority; and eventually, in 1854 . . . they were all brought under the one central authority of the Trinity Board, which had long had an existence, originally as a private body, and gradually and naturally developing its authority and influence and acquiring fresh powers, until at length all lighthouses and beacons were vested in it" (Day, *J., Gilbert v. Trinity House*, 1886, 17 Q. B. D. 795, 800).

The modern legislation dealing with lighthouses, beacons, and buoys is now contained in Part II. of the Merchant Shipping Act, 1894; and "lighthouse" is there defined to include, in addition to the ordinary meaning of the word, any floating or other light exhibited for the guidance of ships, also any sirens and any other description of fog signals, and also any addition to a lighthouse of any improved light, siren, or fog signal; and "buoys and beacons" include all other marks and signs of the sea (s. 742). There are three general lighthouse authorities: the Trinity House (*q.v.*), the Commissioners of Northern Lights, and the Commissioners of Irish Lights. The Trinity House superintends and manages all lighthouses, beacons, and buoys, subject to the rights of the local lighthouse authorities, in England and Wales, the Channel Islands, and the adjacent seas and islands, and Gibraltar; but as regards Guernsey and Jersey, its powers, except as to surrender and purchase of local lighthouses, beacons, and buoys, may be exercised only subject to the consent of Her Majesty in Council, and dues may not be taken in the Channel Islands without the consent of the States of these islands (s. 669). The Commissioners of Northern Lights have the same powers in Scotland and the adjacent seas and islands and the Isle of Man, and are a body corporate, consisting of the Lord Advocate and Solicitor-General for Scotland, the lord provosts of Edinburgh, Glasgow, and Aberdeen, and the provosts of Inverness and Campbeltown, the eldest bailies of Edinburgh and Glasgow, the sheriffs of the Lothians and Peebles, Lanark, Renfrew and Bute, Argyll, Inverness Elgin and Nairn, Ross Cromarty and Sutherland, Caithness Orkney and Shetland, Aberdeen Kincardine and Banff, Ayr, Fife and Kinross, Dumfries and Galloway, and any provost or chief magistrate of any royal or parliamentary burgh on or near the seacoast, or sheriff of a county abutting thereon, elected by the Commissioners to be a member of their body, five constituting a quorum (s. 668). The same power is exercised in Ireland and the adjacent seas and islands by the Commissioners of Irish Lights (s. 634), which is a body incorporated by a local Act of 1867 (30 & 31 Vict. lxxxi.) (s. 742).

These general lighthouse authorities must give to the Board of Trade any return or information it may require concerning the lighthouses in their respective areas (s. 635); and the Board may inspect any such on complaint being made of their being inefficient or ill-managed (s. 636). The Trinity House is further empowered to inspect any lighthouse within any of such areas (s. 637).

A general lighthouse authority may erect, place, add to, alter, or remove lighthouses, beacons, or buoys in its area, or vary the character or mode of lighting of lighthouses (s. 638); it may also buy land for their works, or sell land, and the Lands Clauses Acts (*q.v.*) form part of the Act for this purpose (s. 639). The Commissioners of Northern Lights and

those of Irish Lights cannot, however, exercise their powers before submitting the proposed work to the Trinity House, which transmits it with a report thereon, to the Board of Trade, and the decision of the Board is communicated similarly through the Trinity House (s. 640). The Trinity House also has power, with the sanction of the Board, to direct either of the other two general authorities to continue, erect or place, add to, alter or remove any lighthouse, buoy, or beacon, and vary the character and mode of lighting of any lighthouse, on making application to the Board and giving notice to that general authority, which may represent its view thereon (s. 641). Any addition to a lighthouse for this purpose counts as a lighthouse (s. 642).

A general lighthouse authority has also the power which a harbour authority would have (see HARBOURS), to remove and deal with wrecks on the shores or rocks of the British Islands and the adjacent seas and islands, which are or are likely to be an obstruction or danger to navigation or life-boats in the life-boat service, if there is no harbour authority empowered in that behalf; and the expense is payable out of the Mercantile Marine Fund. If any question arises between a harbour authority and a lighthouse authority as to their respective powers over a particular place, the Board of Trade decides it finally. The powers given for such removal of wreck are cumulative (ss. 530-534).

A general lighthouse authority may levy dues (called light dues) on all ships, except those belonging to Her Majesty and other exempted ships, in respect of lighthouses, buoys, or beacons under its management, which they pass or derive benefit from (s. 643). Dues for new lighthouses, etc., may be fixed by Order in Council (s. 644); and existing dues may be revised in the same way, except that those existing on 1st May 1855 may not be raised beyond the maximum limit then imposable (s. 645). A general lighthouse authority may also, with the sanction of an Order in Council, exempt ships from light dues, receivable by itself, and generally regulate its light dues, saving the Shipping Dues Exemption Act, 1867, which abolishes certain exemptions from local dues (s. 646); and such existing exemptions are preserved (s. 745). Such an exemption is given by Order in Council (16th May 1893) to vessels calling for bunker coal in the United Kingdom or Isle of Man, though they also at the same time load stores and provisions; and a vessel which lands three persons in the United Kingdom (from Malta) who paid no passage money, but only a fixed sum for their food, is not excluded from the exemption (*Hay v. Trinity House*, 1895, 8 Asp. 77). Before that date vessels putting in to coal had to pay light dues (*Neptune S. S. Co. v. Trinity House*, 1887, 3 T. L. R. 615). For the measurement of tonnage of ships on which light dues (*inter alia*) are payable, see secs. 77 (7) and 85, and Sched. 2 of the Act; *Richmond Hill S. S. Co. v. Trinity House*, [1896] 1 Q. B. 493, under SHIP. Light dues are included in port charges in a charter-party (*Newman v. Lamport*, 1895, 8 Asp. 76). Seamen's wages take precedence of light dues, and light dues of a bottomry bond (*The St. Lawrence*, 1880, 5 P. D. 250; *The Andalina*, 1886, 12 P. D. 1). Tables of and regulations relating to light dues must be published in all custom houses in places where such dues may be payable, and in London (s. 647). All light dues paid to a general authority go to the Mercantile Marine Fund; collectors appointed for that purpose by the general authority pay the dues they collect to that authority, which remits them to Her Majesty's Paymaster-General (ss. 648, 677). Light dues are recoverable from the owner or master of the ship, or the consignees or agents thereof who have made themselves liable to pay any other charge

on account of the ship in the port of her arrival or discharge; and such consignees or agents may retain such payment out of any moneys received by them on account of the ship, or belonging to her owner (s. 650). The ship may be distrained upon for light dues by the collector, and the distress may be appraised and sold within three days thereafter (if the dues are not sooner paid), and the dues satisfied thereout (s. 650). A receipt is given for light dues, and the ship may be detained at any port where they are due till it is produced to the customs officer (s. 651).

The expenses incurred by general lighthouse authorities, in lighthouse works and services, are paid out of the Mercantile Marine Fund (s. 658); and their establishments are fixed by Order in Council, and may not be increased without the consent of the Board of Trade (s. 659); and their accounts of expenses, unless allowed as part of the establishment expenses, and their estimates of expenses, before being paid, must be submitted to the Board of Trade (s. 660). The Treasury, on the application of the Board, may make advances for the building and repair of lighthouses, and other extraordinary expenses connected with lighthouses, buoys, and beacons, up to an outstanding limit of £200,000, which are a charge on the Mercantile Marine Fund (s. 661). The Board of Trade may also mortgage that fund for lighthouse expenditure on the same objects (s. 662); and for the same purposes the Public Works Loan Commissioners may advance money upon mortgage of that fund (s. 663). Each general lighthouse authority must account for their receipts from light dues, and their expenditure, to the Board of Trade (s. 664); and may, with the sanction of the Board, grant pensions, on discharge and retirement, to persons paid out of the Mercantile Marine Fund, up to the limit allowed for public civil servants (s. 665).

Besides these general lighthouse authorities, there are also local ones under their control. All lighthouses, beacons, and buoys within the areas of the general authorities, but managed or owned by local authorities, are liable to be inspected by the general authorities, who may make such inquiries in respect thereof as they think fit from the local authority, and must communicate to them the result of their inspection, and report generally thereon to the Board of Trade; and such reports are laid before Parliament (s. 652). Local authorities may be directed by the general authority, with the sanction of the Board and after due notice, to lay down buoys, to remove or discontinue any lighthouse, buoy, or beacon, or vary its character or its mode of exhibiting lights; they cannot erect or place any lighthouse, buoy, or beacon, or do any of the acts just mentioned, without the sanction of the general authority; for failure to do its duty or to comply with the direction of a general authority to the above effect, the powers of the local authority, including that of levying dues, may be transferred to the general authority by Order in Council, and the lighthouse, etc., in respect of which the order is made becomes liable to the provisions affecting those belonging to the general authority; but this does not apply to local buoys or beacons temporarily placed (s. 653). A local authority may sell or surrender any lighthouse, etc., held by it, to the general authority for the area in which it is, and the latter, with the consent of the Board of Trade, may accept or buy it, out of the Mercantile Marine Fund; and on such sale or surrender the lighthouse, etc., becomes liable to the provisions affecting those belonging to the general authority, and gives that authority the right to levy dues for it (s. 654). Light dues for lighthouses, etc., belonging to a local authority (called local light dues) may be fixed on application of that authority by Order in Council, to be paid by every ship

entering the port or harbour under the control of that authority, or the estuary where the lighthouse, etc., is situate, and passing it and deriving benefit therefrom; such local light dues are payable and leviable in the same way as light dues; and may be revised by Order in Council to a point sufficient to meet the expenses incurred by the local authority for the lighthouses, etc., in respect of which they are levied (s. 655). Local light dues must be applied only for building, placing, maintaining, and improving the lighthouses, etc., for which they are levied; and separate accounts of receipts and expenditure of these dues must be kept and sent annually, or as required, to the Board of Trade (s. 656). Local authorities have no power, except with the consent of Her Majesty in Council, to reduce their light dues (s. 657).

Under the Harbours, Docks, and Piers Clauses Act, 1847, a harbour authority is bound to lay down buoys as the general authority directs, and may not erect lighthouses, etc., or exhibit lights, without the sanction of the general authority (10 & 11 Vict. c. 27, ss. 77, 78). Any injury to a lighthouse or its lights, or a buoy or beacon, or removing, altering, or destroying any lightship, buoy, or beacon, or riding by, making fast to, or running foul of any lightship or buoy, is punishable with a fine up to £50, besides the expenses of making good the damage so caused (s. 666; thus *The Indus*, 1886, 12 P. D. 46; see COLLISIONS AT SEA). The burning or exhibiting of any fire or light at a place or in a way liable to cause it to be mistaken for a lighthouse light, may be prohibited by the general lighthouse authority giving notice to the owner of the place, or person in charge of the light, to extinguish or screen it and prevent any such future light; and failure to comply with such notice is a common nuisance, and entails a penalty of £100; and if such light is not so prevented within seven days after such notice, the authority may enter the place and extinguish the light at the expense of the person receiving the notice (s. 667). For colonial lighthouses, see that head, vol. iii. The Mercantile Marine Fund is also charged with the reasonable costs allowed by the Board of Trade for advertising or otherwise making known the establishment of or alterations in foreign lighthouses, buoys, and beacons to owners, masters, and other persons interested in British ships (s. 677 (m)). All lighthouses, buoys, and beacons, and light dues, etc., the property of or occupied by general lighthouse authorities, used for the purposes of any of the services for which these dues, etc., are received, and all instruments and writings used by or for general lighthouse authorities in carrying on those services, are exempt from all taxes, rates, and duties of any kind (s. 731). All vessels belonging to general lighthouse authorities are exempted from payment of harbour dues in the United Kingdom (s. 732). They are also exempt from the statutory provisions with respect to the officers, crews, and apprentices of ships (s. 262; see APPRENTICES, SEA; CREW; LOG-BOOK). The rights of lighthouse authorities are also saved from the scope of Lloyd's Signal Stations Act, 1888; and Lloyd's may not set up any signal-house or other erection or work which in the opinion of the general lighthouse authority for that place would obstruct or interfere with any lighthouse light, vessel, beacon, buoy, fog signal, or other seamark under its jurisdiction; if it does so, the lighthouse authority may abate and remove such work at the cost of Lloyd's (51 & 52 Vict. c. 29, ss. 9 and 10).

A general lighthouse authority, such as the Trinity House, is liable to an action for negligence in the performance of its duties causing damage to another person, *e.g.* leaving the stump of a beacon under water with which a ship collided (*Gilbert v. Trinity House*, 1886, 17 Q. B. D. 795).

[*Authority*.—See generally, Temperley, *Merchant Shipping Act*.]

**Lighting and Watching.**—1. In the county of London the lighting of the streets is under the control of the Vestries and District Boards, under the Metropolis Management Acts (see LONDON, COUNTY). In the city it is in the hands of the corporation (see LONDON, CITY). The watching in the county of London is in the hands of the metropolitan police (see METROPOLITAN POLICE DISTRICT), and in the city in the hands of the city police (see LONDON, CITY).

2. In urban districts and rural districts in England to which urban powers have been extended, the lighting of the streets and the provision of fire brigades is dealt with under the Public Health Acts (see TOWN GOVERNMENT), and the watching is regulated under the Police Acts or the Municipal Corporations Act, 1882 (see POLICE).

3. The Lighting and Watching Act, 1833 (3 & 4 Will. iv. c. 90), made provision for management of lighting and watching in any parish, whether urban or rural, the inhabitants of which chose to adopt its provisions. In London it has been superseded by the Metropolis Management Acts and the Metropolitan Fire Brigade Act, 1865.

The Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 7), has, without repealing any part of the Act of 1833, modified and adapted it to the new parochial government, and its nature on their adoption is as follows:—

Where a place which has adopted the Lighting and Watching Act, 1833, has been since 1875 constituted or included in an urban district, or has become subject to the Public Health Act, 1875, by a Local Government Board Order, the Act of 1833 is superseded, and the property vested under that Act passes to the council of the borough or other urban district (38 & 39 Vict. c. 55, s. 163). The effect of this enactment is clearly to exclude the machinery of the Act for urban districts and rural districts possessing urban powers under sec. 276 of the Public Health Act, 1875, or sec. 25 (5) of the Local Government Act, 1894, and it appears also to supersede the Act in such a district, where the urban powers are given prior to adoption (Michael and Will on *Gas and Water*, 4th ed., 437; Glen on *Public Health*, 11th ed., 352). The result is that the Act is in force, or can be put in force, only in rural parishes not lying within a district the council whereof has urban powers.

The parochial electors of a parish may adopt the Act at a parish meeting held for the whole or any part of the parish, or by a poll consequent on the meeting by a majority of two-thirds of the votes given (1833, ss. 8, 71; 1894, s. 7; *In re Eynsham*, 1849, 18 L. J. Q. B. 210).

The meeting is convened on a demand of three electors addressed to the churchwardens of the whole parish, who for the purpose appear not to be deposed by the chairman of the parish council or meeting, and the chairman of the meeting is selected by the meeting and need not be an elector (*R. v. Middlesex Justices*, 1853, 22 L. J. M. C. 106; *R. v. Kingswinford Overseers*, 1854, 23 L. J. Q. B. 337).

A proposal to adopt, if rejected, cannot be renewed till a year has elapsed (1833, s. 16). The Act may be adopted as to lighting, as to watching, or both. Since the establishment of the police force the watching provisions are not adopted, but only those as to lighting and fire engines.

The adoption of the Act has to be published by notices (*R. v. Deverell*, 1854, 23 L. J. M. C. 121; but see *R. v. Reynolds*, [1893] 2 Q. B. 75). On adopting the Act, the meeting must fix the amount of money to be raised by rate, and an annual meeting must be held to fix the amount for the year (1833, s. 9). After adoption for three years, the Act may be abandoned by a simple majority of the parochial electors (1833, s. 15). A simple majority



of the qualified voters is sufficient for fixing the rate or abandoning the Act (*Beechey v. Quenterey*, 1842, 10 Mee. & W. 65).

Where the parish has a parish council, they carry out the Act, whether it was adopted before or since the council was created (1894, s. 7 (5) (7)), except in cases where parishes have combined. Where a parish has not a parish council, the Act is executed by from three to twelve inspectors appointed by the parish meeting from among resident ratepayers assessed to the poor on an annual value of £15 (s. 17), of whom one-third go out of office annually but are re-eligible. The election takes place at the annual meeting; but casual vacancies are filled at once. The inspectors hold monthly meetings, and may appoint officers, and submit their accounts and vouchers to the churchwardens for consideration at the annual meeting (ss. 18, 19).

The powers of the parish council or of the inspectors are—

1. To contract with any person for lighting the streets, roads, and other places, and for the supply of the necessary implements for street lighting (1833, ss. 45–60).

2. To provide and keep up fire engines with pipes and proper utensils (1833, s. 44). This power can, however, be exercised by the parish council without adoption of the Act (1867, c. 106, s. 29; 1894, c. 73, s. 6 (c) iii.). See FIRE; POLICE.

Lands and offices may be purchased or rented for the purposes of the Act, but not compulsorily (1833, ss. 24, 59), except perhaps under sec. 9 of the Local Government Act, 1894. There is no power to borrow for the purposes of the Act, except perhaps under sec. 12 of the Act of 1894.

*Expenses and Rating.*—The amount to be raised for the purposes of the Act is fixed at the annual parish meeting (1833, ss. 9, 18, 33). It is distinct from, and not affected by, the rate-limit imposed as to ordinary parochial expenses (1894, c. 73, s. 11 (3)). It is raised out of a rate levied by the overseers under order of the parish meeting or the inspectors, in the same manner as the poor rate, upon the owners and occupiers within the parish (ss. 23, 37). The owners and occupiers of houses, buildings, and property other than land (including coal mines (*Thursby v. Briercliffe-cum-Entwistle Overseers*, [1895] App. Cas. 32), and dock premises (*R. v. Peto*, 1859, 28 L. J. M. C. 240) are rated at a pound rate three times that levied on owners or occupiers of "land" which includes mines and quarries other than coal mines, canals (*R. v. Neath Canal*, 1871, L. R. 6 Q. B. 707), railways (*R. v. Midland Rwy. Co.*, 1875, L. R. 10 Q. B. 389), water mains (6 El. & Bl. 1008), and tithes (14 & 15 Vict. c. 50). Land and other rateable subjects must be separately assessed, and the assessment is appealable against like a poor law assessment. The rate must be published in the same way as a poor rate (*R. v. Whipp*, 1841, 12 L. J. M. C. 64), and it appears to be within the compounding provisions of the Poor Rate Assessment and Collection Act, 1869 (*R. v. Oxfordshire Justices*, 1870, 22 L. T. O. S. 219).

The rate must be limited to the part of a parish for which the Act is adopted (*Potton Churchwardens v. Brown*, 1864, 10 L. T. N. S. 525).

On default of payment, the rate is enforced like a poor rate (s. 33); and it is not necessary in such proceedings to prove that the proper formalities for adopting the Act have been satisfied (*R. v. Reynolds*, [1893] 2 Q. B. 75).

**Light Locomotives.**—The law relating to "light locomotives" is governed by the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), together with the regulations of the Local Government Board, made

pursuant to sec. 6 (1) of the Act, and intituled "The Light Locomotives on Highways Order, 1896," dated November 9, 1896 (which "order" is hereinafter referred to as Reg. L. G. Bd.). A "light locomotive" is to be deemed to be a carriage within the meaning of any Act of Parliament, whether public, general, or local, and of any rule, regulation, or by-law made under any Act of Parliament, and, if used as a carriage of a particular class, is to be deemed to be a carriage of that class, and the law applying to carriages of that class is to apply accordingly (s. 1 (1) (b)); and by Art. I. of Reg. L. G. Bd. the expression "light locomotive" means a vehicle propelled by mechanical power which is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle with its locomotive not exceeding in weight, unladen, four tons), and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause. The word "carriage" includes a waggon, cart, or other vehicle (*ibid.* See also, for the general definition of carriage, sec. 4 (3) of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), under EXCISE, vol. v. p. 116). If a light locomotive is used as a hackney carriage, all the statutory provisions and by-laws relating to hackney carriages in force in the place in which the light locomotive is used, will apply to it. The use of petroleum or any other inflammable liquid or fuel as a means of propulsion is subject to the regulations of the Secretary of State, dated November 3, 1896 (s. 5).

Light locomotives falling within the above definitions will *not* be subject to the following enactments:—The Locomotives Act, 1861 (24 & 25 Vict. c. 70) (except so much of sec. 1 as relates to tolls on locomotives, and secs. 7 and 13); sec. 41 of the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93); the Locomotives Act, 1865 (28 & 29 Vict. c. 83); the Locomotives Amendment (Scotland) Act, 1878 (41 & 42 Vict. c. 58); Part II. of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77); sec. 6 of the Public Health (Ireland) Amendment Act, 1879 (42 & 43 Vict. c. 57); or to any other enactment restricting the use of locomotives on highways, and contained in any public, general, or local, or personal Act in force at the passing of the new Act (s. 1 (1)). Light locomotives are not thus exempt from the payment of certain tolls under sec. 1 of the Locomotives Act, 1861; nor from the provisions of sec. 7, which requires damage caused by locomotives to bridges to be made good; nor from the provisions of sec. 13, which provides that nothing in that Act shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and that every person using a locomotive engine on a highway shall, notwithstanding the Act, be liable to an indictment or action for such use where, but for the passing of the Act, such indictment or action could be maintained.

A light locomotive, when used on a highway, must not be driven at any speed greater than is reasonable and proper having regard to the traffic on the highway, or so as to endanger the life or limb of any person, or to the common danger of passengers, and under no circumstances must a light locomotive be driven at a greater speed than twelve miles an hour if its weight, *unladen*, is under one and a half tons; but if its weight, unladen, exceeds one and a half tons and is under two tons, the speed is not to exceed eight miles per hour; and if over two tons unladen, but under three tons, the speed is not to exceed five miles per hour. If, however, the light locomotive is used to draw any vehicle, under no circumstances is the speed to exceed six miles per hour (s. 4; Reg. L. G. Bd., Art. IV. (1) (2)). The effect of the foregoing regulations is that though these speeds must not be

exceeded, yet a light locomotive must be driven at any *less* speed if the traffic on the highway and the safety of the public so require it. If a light locomotive exceeds in weight, unladen, five hundredweight, it must be capable of being so worked that it may travel either forwards or backwards (Reg. L. G. Bd., Art. II. (1)); but the driver shall not cause it to travel backwards for a greater distance or time than may be requisite for the purposes of safety (Reg. L. G. Bd., Art. IV. (3)).

The following further regulations, *ejusdem generis*, are imposed on the driver of a light locomotive: he must be in such a position when on the locomotive as to have a control over it, and must not quit it without having taken due precautions against its being started in his absence, or allow it, or a vehicle drawn by it, to stand on any highway so as to cause any unnecessary obstruction thereof; and when meeting any carriage, horse, or cattle, he must keep on the left or near side of the road, and when passing any carriage, horse, or cattle proceeding in the same direction, keep it on the right or off side of the same; he must not negligently or wilfully prevent, hinder, or interrupt the free passage of any person, carriage, horse, or cattle on the highway, and must keep the light locomotive, and any vehicle drawn by it, on the left or near side of the road for the purpose of allowing such passage; and on the request of any police constable or of any person having charge of a restive horse, or on such constable or person putting up his hand as a signal for that purpose, cause the light locomotive to stop and to remain stationary as may be reasonably necessary (Reg. L. G. Bd., Art. IV. (4) (5) (6) (8)).

Every light locomotive is chargeable, in addition to the duty payable under the Customs and Inland Revenue Act, 1888 (see EXCISE, vol. v. p. 116), with a duty of £2, 2s. if the weight of the locomotive exceeds one ton unladen, but does not exceed two tons unladen; and of £3, 3s. if the weight of the locomotive exceeds two tons. In calculating, for the purposes of the Act, the weight of a vehicle unladen, the weight of any water, fuel, or accumulators used for the purpose of propulsion are not to be included (s. 1 (2)).

A light locomotive must have attached a lamp so constructed and placed as to exhibit a white light visible within a reasonable distance in the direction towards which it is proceeding, and to exhibit a red light so visible in the reverse direction. The lamp must be placed on the extreme right or off side, in such a position as to be free from all obstruction to the light (s. 2; and Reg. L. G. Bd., Art. II. (9)); and the penalty for an infringement of this (or of any other provision of the Act, or of any by-law or regulation made under the Act) is a fine not exceeding £10 (s. 7). A bell or other instrument capable of giving audible and sufficient warning of its approach or its position must be carried and sounded whenever necessary by the person driving or in charge of a light locomotive (s. 3; and Reg. L. G. Bd., Art. IV. (7)).

No person shall cause or permit a light locomotive to be used on any highway, or shall drive or have charge thereof when so used, unless certain conditions are satisfied, amongst which the following are the more important: there must be in charge of the light locomotive when used on a highway, a person competent to control and direct its use and movement, it must not exceed six and a half feet in width between its extreme projecting points, the tyres of the wheels are to be smooth and of certain widths, etc., it must have two independent brakes in good working order, and it must be at all times under such control as not to cause undue interference with passenger or other traffic on any highway (Reg. L. G. Bd.,

Art. II. (2) (3) (4) (5)). A light locomotive drawing, or constructed to draw, another vehicle, or constructed or used for the carriage of goods, must have the name of the owner and the place of his abode or business painted in one or more straight lines upon some conspicuous part of its right or off side in large legible letters in white upon black or black upon white, not less than one inch in height; and a light locomotive, weighing, unladen, one and a half tons or upwards, must have the weight so painted up (*ibid.* (6), Art. III. (1)); and if this regulation is not complied with, or if the light locomotive is one to which it does not apply, the person driving or in charge of the light locomotive must, on the request of any constable, or on the reasonable request of any other person, truly state his name and place of abode, and the name and the place of abode or business of the owner (Reg. L. G. Bd., Art. V.).

By sec. 6 (2) of the Act a local authority may apply to the L. G. Bd. to make further regulations of a local nature, and limited in their application to a particular area, as to the speed of light locomotives, and prohibiting or restricting their use for purposes of traction in crowded streets or in other places where such use may be attended with danger to the public.

Sec. 28 (4) of the Highways and Locomotives (Amendment) Act, 1878, has been varied by an "order" of the L. G. Bd., dated November 26, 1897. This variation is with regard to the "driving wheels" of locomotives generally.

All regulations made by the L. G. Bd. under sec. 6 (1) have effect, notwithstanding anything in any other Act, whether general or local, or any by-laws or regulations made thereunder (s. 6 (2)). The Act, etc., applies to England, Scotland, and Ireland, and came into operation on the 14th of November 1896.

[*Authorities.*—Mears, *Law of the Motor Car*, 1896; Lewis and Porter, *Law relating to Motor Cars*, 1896.]

**Light Railways.**—"An Act to facilitate the construction of Light Railways in Great Britain" is the title of the Light Railways Act, 1896 (59 & 60 Vict. c. 48). This Act came into operation on the 14th August 1896, and applies to England, Scotland, and Wales. A "light railway" is not defined by the Act, and it is doubtful whether the words "light railway" include purely *urban* "tramways"—the Board of Trade not yet having given their decision on this point—raised by the Light Railway Commissioners having refused to sanction an "order" for a purely *urban* line, holding that such a scheme was not within the scope of the Light Railways Act, 1896.—Under this Act power is given to promoters of light railways to acquire the land, etc., requisite for the scheme *without recourse to Parliament* (which is necessary in the case of "private bills"); and the Light Railway Commissioners *must* hold *local* inquiries into the merits, etc., of each proposed scheme (s. 7 (1)), and the Board of Trade *may* also hold local inquiries if they think fit (s. 9 (6)). Before an application for an order is lodged with the Commissioners the promoters must publish an advertisement, once at least, in each of two successive weeks in April or October in some (one and the same) newspaper circulating in the area or some part of the area through which the proposed railway is to pass. This advertisement must contain (amongst other things) a general description of the line of railway, the lands it is proposed to take, and the quantity and purpose for which they are to be taken—the *proposed* gauge and the  *motive power*

—the address of the place where a plan of the works and a book of reference to the plan, and a section of the works, etc., can be seen, and where copies of the *draft* order can be obtained at a price not exceeding 1s. per copy; and the advertisement must also state that any objections to the scheme should be made in writing to the secretary of the Light Railway Commission (for address, etc., see *infra*). These advertisements must be subscribed with the name and address of the person, company, or council responsible for the same. A “notice” is required to be served in the month of April or October in the manner and in the form prescribed by the rules on every owner or reputed owner and lessee, and the occupiers of all lands intended to be taken. Copies of the *draft* order, plan, book of reference, and section, and the estimates, etc., must be deposited in the months of May or November with the clerk of every county, borough, district, or parish council in or through whose county, borough, district, or parish any part of the railway is proposed to be made; and copies of all the foregoing documents must also be deposited by the promoters in the same months with the Board of Trade, and copies of the *draft* order with the Treasury and some of the other Government departments (rule 4). The “estimate” is to be according to the form given in rule 26, or “as near thereto as circumstances may permit”; and in addition it is to include the expense of *acquiring land* and *all* incidental expenses, and it must be signed by the person making it.

Applications for orders can be made by the “council” of any county, borough, or district (through any part of which the proposed railway is to pass); a railway, tramway, or any other company or corporation; any individual; “jointly” by any such councils, companies, corporations, or individuals (s. 2). “Parish” councils cannot apply for an order for the construction, etc., of a light railway. The Act confers upon “councils,” who may be authorised by an order, the power of themselves constructing and working or contracting for the construction or working of a light railway, and also of advancing to a light railway “company,” either by way of loan or as part of its share capital, or partly in one way and partly in the other, of any amount which may be authorised by an “order.” And any council may join any other council (except a “parish” council) in doing any of the above things, or do any other act incidental thereto (s. 3 (1)). But before a council can make an application for an “order” for the construction, working, advance, etc., it must pass a special resolution authorising such application (*ibid.* (2) (a), and Sched. I). Councils can only construct and work or make an advance to a light railway wholly or partly *outside* their area “jointly” with the council of the outside area, except they can prove to the satisfaction of the Board of Trade that such construction, working, advance, etc., is expedient in the interests of their area, but in this case their expenditure will be limited so as to bear a due proportion to the benefit which will accrue to their area from such construction, etc. (*ibid.* (2) (b)). The Treasury can make loans to light railway companies where councils have advanced or agreed to advance the latter any sum, and they may also make an advance by lending them one-quarter of the total amount required for the purpose of the railway (and not exceeding the amount for the time advanced by the council), but they cannot advance any money for this purpose unless one-half at least of the total amount required is provided by means of “share capital,” and at least one-half of this “share capital” must be subscribed for and paid up by persons other than local authorities before they will even advance this amount. Such advances are to bear the minimum

interest of  $3\frac{1}{2}$  per cent. per annum (s. 4). The Treasury can also, under certain circumstances, agree to aid a light railway by means of "special advances," but they must have the guarantee beforehand of some *existing railway company* for the proper construction and working in perpetuity of any light railway to whom they make these "special advances" (s. 5). An order may incorporate with exceptions and variations all or any of the provisions of the "Clauses Acts," but nothing is to authorise *any variation* of the provisions of the Lands Clauses Acts with respect to the purchase and taking of lands *otherwise* than by agreement, but any matters which under that Act are determinable by the verdict of a jury, by arbitration, or by two justices, are under the Light Railways Act to be referred to, and determined by, a single arbitrator to be appointed by the parties (or if the parties do not concur in the appointment of such arbitrator, then by the Board of Trade), and the provisions of the Arbitration Act, 1889 (see ARBITRATION), are to apply to any such arbitration. Notices (and other such documents) may be in writing or print, or partly in writing and partly in print. It will be sufficient if they are signed by the clerk of a "council," some principal officer of a "company," or by the promoter or any two or more of the promoters, on whose behalf the notice or other document is served (rule 28). When an "application" is made for an "order" by a body corporate it must be under the seal of such body, and in any other case it must be signed by the promoter or promoters, or, if there are more than two, by any three of them. Applications for "orders" authorising the construction, etc., of light railways can only be made in the months of May and November, and must be lodged with the Commissioners on or before the 31st May or the 30th November in each year. The only fees payable to the Board of Trade in relation to an "application," etc., for a light railway is a single sum of £50, which must be paid at the time of lodging the "application." Any "order" made by the Commissioners is to be provisional only, and will have no effect until confirmed by the Board of Trade, when it will have all the binding force of an Act of Parliament (ss. 7 (5), 10). All communications to the Commissioners must be on foolscap paper and written on one side only, and addressed to the "Secretary, Light Railway Commissioners, 23 Great George Street, London, S.W." The rules made by the Board of Trade under the Act are dated "September 1896."

[*Authorities.*—Austin (Evans), *The Light Railways Act, 1896, with the Rules of the Board of Trade, Notes, etc.*, 1896; Dodd and Allan's *Law of Light Railways*, 1896.]

**Lights (Ecclesiastical Law).**—1. *Lights on Altar.*—The question of the legality of lights on the altar or holy table has been the subject of a number of conflicting legal decisions, to understand the bearings of which it is necessary to consider the history of the subject. Two archi-episcopal constitutions of 1222 and 1322 (Lind. iii. p. 7, i. p. 236; supplement to *Read v. Bishop of Lincoln*, 1890, Prob. 95) provide that two candles, or, at least, one be burnt at the celebration of the Mass.

It would appear that prior to the Reformation, lights on the altar were common but not universal, while a light before the reserved sacrament was universal. The number of lights on the altar in different cathedrals and parochial churches also varied.

The 3rd injunction of Edward VI. 1547 (as to the legal force of these injunctions, see article INJUNCTIONS OF EDWARD VI. AND ELIZABETH) provides

*inter alia* that they (that is the deans, archdeacons, parsons, vicars, and other ecclesiastical persons)—

Shall suffer from henceforth no torches, nor candles, tapers, or images of wax to be set afore any image or picture, but only two lights upon the high altar before the sacrament, which, for the signification that Christ is the true light of the world, they shall suffer to remain still.

Sec. 4 of the Elizabethan Act of Uniformity (1 Eliz. c. 2) forbids any minister to use—

Any other rite, ceremony, order, form, or manner of celebrating the Lord's Supper, openly or privily, or matins, evensong, administration of the sacraments, or other open prayers than is mentioned in the said book,

*i.e.* the Second Prayer-Book of Edward VI., as altered by the Act in question.

Candlesticks and lighted candles appear to have been used at times in Queen Elizabeth's chapels in spite of the objection of the extreme Protestant party. Before 1610, however, the use of both had largely disappeared; but between the years 1621 and 1641 they were again revived (see the proceedings against the prebendaries of Durham Cathedral in 1628–29, noted in *Read v. Bishop of Lincoln*, [1892] Prob. at p. 82 (in which cases it was distinctly held that lights on the altar were not rendered illegal by the Act 1 Eliz. c. 2)).

Between 1660 and 1750 (and especially from 1680) there is a considerable amount of evidence for the use of candlesticks with both lighted and unlighted candles in churches, especially in cathedrals.

After 1750 lights went out of general use, so much so that in the present century their legality was again called into question (see *Westerton v. Liddell*, 1855, Moo. Special Rep. 4 W. R. 167 (in which case, however, Dr. Lushington, Chancellor of the Consistory Court of London, distinctly held that candlesticks might be lawfully placed on or near the altar as necessities, and lighted when required for the purpose of giving light); *Liddell v. Beal*, 1860, 14 Moo. P. C. 1 (in which case the Judicial Committee of the Privy Council considered that the placing of a super altar upon or at the back of a holy table or altar for the purpose of holding candlesticks, and on which two candlesticks were placed, was not illegal); *Martin v. Mackonochie*, 1868, L. R. 2 Ad. & Ec. 116; L. R. 2 P. C. 365; see also *Sumner v. Wix*, 1870, L. R. 3 Ad. & Ec. 58).

In *Read v. Bishop of Lincoln*, 1890, 1 Prob. 9, where one of the charges against the defendant was that he permitted lighted candles to be used on the "communion table," the Archbishop of Canterbury (Dr. Benson), after an exhaustive examination of the historical aspects of the subject, held that the mere fact that two lighted candles, not required for the purpose of giving light, were kept standing continuously on the altar or holy table during the celebration, did not constitute a breach of the law either on the ground of the Act of Uniformity (1 Eliz. c. 2), as had been considered to be the case, or on any other ground. On appeal ([1892] App. Cas. 644) the Judicial Committee of the Privy Council held that the fact that two candles, not required for the purpose of giving light, were alight throughout the celebration of the Holy Communion on the holy table without objection on the part of the respondent, who was officiating as bishop, there being no evidence of a ceremonial use of lights, or that the respondent had introduced them as unlawful ornaments, did not constitute an ecclesiastical offence on his part.

The effect of these two last decisions seems to be that the former decisions, so far as they condemn the burning of two lights at the com-

munion service as a sign that Christ is the true light of the world, are discredited. The question whether candles may lawfully be lit during the communion service was left open by the Archbishop of Canterbury in the *Bishop of Lincoln's* case, and still remains so. In the recent case of *In re St. Paul's, Camden Square*, 1897, 14 T. L. R. pp. 85, 156, Dr. Tristram, Chancellor of the Consistory Court of London, granted a faculty for the placing of two lights on the retable, subject to a proviso that they should not be lighted at the ordinary morning or midday, afternoon or evening services, the question of lighting them at early celebrations being left open. It is understood that this judgment (some remarks in which are difficult to reconcile with the *Lincoln* judgment, and even more so with the historical facts which it elucidated) is under appeal.

2. *Lights in a Church but not on the Altar.*—To cause lighted candles to be held one on each side of the priests, when engaged in reading the gospel, such lighted candles not being required for the purpose of giving light, was held to be unlawful in *Sumner v. Wix* (*supra*), and see the Injunction of Edward VI. (*supra*).

[*Authorities.*—Lindwood, *Prov.*; Phillimore, *Ecc. Law*, 2nd ed.; Prideaux, *Churchwarden's Guide*, 16th ed.; authorities cited in *Read v. Bishop of Lincoln*, pp. 95–107.]

**Like.**—"The like" is not synonymous with "the same." Therefore where in a marriage settlement the ultimate limitation of a sum of money belonging to the wife was to her "next-of-kin of her own blood and family in due course of distribution, the same as if she had died a *feme sole* and intestate," and the settlement contained a covenant that the wife's after-acquired property, real and personal, should be settled upon "the like trusts, intents, and purposes," it was held that, in default of appointment, after-acquired realty went to her heir-at-law, and personalty to her next-of-kin (*Brigg v. Brigg*, 1885, 54 L. J. Ch. 464).

Company "of a like nature," see *In re Empire Assurance Corporation*, 1867, L. R. 4 Eq. 341.

A "like penalty" means a penalty of like amount, and recoverable in like manner (per Lord Selborne, L.C., in *Bradlaugh v. Clarke*, 1883, 8 App. Cas. 357).

The words "like proceedings" in sec. 21 of the Highway Act, 1864, include all the proceedings contained in sec. 85 of the Highway Act, 1835, for the purpose of procuring the stopping up of a highway, and also those proceedings designated by the general name of appeal to Quarter Sessions, given by sec. 88 of the same Act (*R. v. Justices of Surrey*, 1869, L. R. 5 Q. B. 87).

See also IN LIKE MANNER; LAND OF LIKE QUALITY; and Stroud, *Jud. Dict.*

**Likewise.**—A clause in a will beginning with the word "likewise" or with the word "item" is, *prima facie*, to be read independently of the former clause,—a construction which may be maintained or rebutted by the context. In *Paylor v. Pegg*, 1857, 24 Beav. 111, Sir John Romilly, M. R., said he was satisfied that it was not the intention of the Lords Justices in *Boosey v. Gardner*, 1854, 5 De G., M. & G. 122 (which had been cited as deciding that where the word "likewise" began a clause in a will it constituted a separate and independent gift, unconnected with that which pro-



ceded), to establish this proposition: "That whenever the word 'likewise' occurs, the contingency which governs the previous gift is not to govern that which follows, if the subject-matter is clearly connected, as, for instance, where one part is dealing with a life estate and the other with the reversion."

[*Authority*.—Jarman, *Wills*, 5th ed., 790, 791.]

**Limit.**—Sec. 43 of the Public Health Act, 1872 (which is reproduced in sec. 227 of the Public Health Act, 1875), provides that "any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes." On this section it was held in *Walton Commissioners v. Walford*, 1875, L. R. 10 Q. B. 180, that "limit" did not include "exemption," and therefore that property exempted under a local Act was not rateable under the Public Health Act.

## Limitation; Limitations (Statutes of).

### TABLE OF CONTENTS.

I. DIFFERENT STATUTES APPLICABLE * TO PARTICULAR PROCEEDINGS	466	III. EFFECT OF DISABILITY, ETC.	475
II. TIME FROM WHICH PRESCRIBED PERIOD OF LIMITATION RUNS	471	IV. CASES TO WHICH THE STATUTES OF LIMITATIONS DO NOT APPLY	478

Apart from statute, lapse of time does not of itself extinguish any right of action. At law the doctrine of presumption of payment might afford an answer to an action brought to recover a debt after a considerable lapse of time, and in equity the fact of allowing a long interval to elapse before seeking an equitable remedy might be a reason for refusing relief. Various statutes have from time to time been passed which bar nearly all personal actions after the lapse of a prescribed period, but which leave other remedies, such as liens, etc., untouched; while other statutes affecting real property, not only bar rights of action after the lapse of the prescribed period, but extinguish rights and titles altogether. The statutes which fix a certain period within which a right of action must be enforced are generally known as the Statutes of Limitations. It is proposed in this article to deal with the various Statutes of Limitations under the following heads:—

- I. The different statutes applicable to particular proceedings.
- II. Time from which the prescribed period of limitation runs.
- III. Effect of disability, acknowledgment, and part-payment in preventing the operation of the different Statutes of Limitations.
- IV. Cases to which the Statutes of Limitations do not apply.

#### I. THE DIFFERENT STATUTES APPLICABLE TO PARTICULAR PROCEEDINGS.

The various Statutes of Limitations may be divided into three classes—

- (1) Statutes relating to personal actions.
  - (2) Statutes relating to real property.
  - (3) Statutes relating to penal actions, criminal proceedings, and other proceedings excepted from or not included in (1) and (2).
- (1) Statutes relating to personal actions.

These again may be subdivided as follows:—

(a) The Limitation Act, 1623 (21 Jac. I. c. 16), which, as amended by 4 & 5 Anne, c. 3, and the Mercantile Law Amendment Act, 1856, applies to most simple contracts and torts.

(b) The Acts 3 & 4 Will. IV. c. 42, s. 3, the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27, s. 42), and the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, s. 8), which apply to all actions for the recovery of money which are not within the Limitation Act, 1623.

(2) Statutes relating to real property.

These may be thus subdivided—

(a) The Real Property Limitation Act, 1833, the Real Property Limitation Act, 1837 (7 Will. IV. and 1 Vict. c. 28), and the Real Property Limitation Act, 1874, govern rights to real property other than property of the Crown.

(b) The Nullum Tempus Act (9 Geo. III. c. 16), the Crown Suits Act, 1861, the 7 & 8 Vict. c. 105, and the 23 & 24 Vict. c. 53, govern proceedings affecting the real property of the Crown.

(3) Statutes relating to (a) penal actions, (b) criminal proceedings and other proceedings not included in (1) and (2). These are too numerous to be classified, but the two of most general importance are the Summary Jurisdiction Act, 1848, relating to summary proceedings before justices, and the Public Authorities Protection Act, 1893, relating to actions and prosecutions brought against persons for things done in execution of an Act of Parliament.

(1) Statutes relating to personal actions.

(a) The Limitation Act, 1623, as amended by 4 & 5 Anne, c. 3, and the Mercantile Law Amendment Act, 1856, provide three different periods of limitations—

(α) Six years for all actions on the case except slander (including both *assumpsit* and *indebitatus assumpsit*—*Chandler v. Vilett*, 1670, 2 Wms. Saun. 391), actions of account, trespass, debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, trover, and replevin.

(β) Four years for actions of assault, battery, wounding, and imprisonment.

(γ) Two years for actions of slander.

(b) Personal actions for the recovery of money which were not within the Limitation Act, 1623, are mostly provided for by 3 & 4 Will. IV. c. 42, s. 3; 37 & 38 Vict. c. 57, s. 8; and 3 & 4 Will. IV. c. 27, s. 42. The Act 3 & 4 Will. IV. c. 42 provides a limitation of twenty years for actions of debt for rent upon an indenture of demise or covenant or debt upon any bond or other specialty, actions of debt, or *scire facias* upon a recognisance; for actions of debt upon any award where the submission is not by specialty, or for a fine due in respect of copyhold estates, or for an escape, or for money levied on any *fieri facias*, the period of limitation by the same statute is six years.

By sec. 8 of 37 & 38 Vict. c. 57, for proceedings to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, the period of limitation is twelve years.

By sec. 42 of 3 & 4 Will. IV. c. 27, the period of limitation for the recovery of arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest, is six years.

These three statutes provide for almost all the cases of personal actions for recovery of money which had not been provided for by the Limitation Act, 1623.

It will be noticed that the provisions of these three statutes to some extent conflict with one another; for instance, an action for arrears of rent, where there is a covenant in a deed to pay the rent, falls within the words both of sec. 42 of 3 & 4 Will. iv. c. 27, which provides a limitation of six years, and of sec. 3 of 3 & 4 Will. iv. c. 42, which provides a limitation of twenty years. In such a case, where the action is brought on a covenant, and is not a proceeding to recover money out of the land upon which it is charged, sec. 3 of 3 & 4 Will. iv. c. 42 applies, and excludes sec. 42 of 3 & 4 Will. iv. c. 27, and the period of limitation in such a case is twenty years (*Strachan v. Thomas*, 1840, 12 Ad. & E. 556). When the action is not on a covenant, even in cases where there is a covenant to pay debt or interest, 3 & 4 Will. iv. c. 27, s. 42, applies, and only six years' arrears are recoverable; thus in a foreclosure action, although the mortgage deed contains a covenant to pay principal and interest, only six years' arrears of interest can be recovered, because the action is not brought on the covenant (*Hughes v. Kelly*, 1843, 3 D. & W. 482). Similarly, in a redemption action, although the mortgage deed contains a similar covenant, a mortgagor is entitled to redeem, it appears, on the payment of six years' arrears only (see Darby and Bosanquet on the *Statutes of Limitations*, 2nd ed., pp. 204-207).

When sec. 8 of 37 & 38 Vict. c. 57, and sec. 3 of 3 & 4 Will. iv. c. 42, conflict, sec. 8 of 37 & 38 Vict. c. 57 prevails. Thus, where money is charged on land and is also secured by a covenant in a deed, sec. 8 of 37 & 38 Vict. c. 57 applies to an action on the covenant in the deed as well as to the remedy against the land, and in such a case the period of limitation is twelve years and not twenty (*Sutton v. Sutton*, 1882, 22 Ch. D. 511; *Fearnside v. Fearnside*, 1882, 22 Ch. D. 581). The curious result follows that, if land is mortgaged, and a bond to which the mortgagor is not a party is executed by sureties to secure the mortgage debt, sec. 8 of 37 & 38 Vict. c. 57 does not apply to the remedy against the sureties, and the period of limitation for an action against them is twenty years, while the remedy against the mortgagor is barred at the end of twelve years (*In re Powers*, *Lindsell v. Phillips*, 1883, 30 Ch. D. 291); even when a mortgage deed contains a joint and several covenant by the mortgagor and a surety to pay the mortgage debt, sec. 8 of 37 & 38 Vict. c. 57 applies to an action on the covenant against the mortgagor, but not to an action on the covenant against the surety, and in such a case the liability of the surety remains for eight years longer than the liability of the mortgagor (*In re Frisby*, *Allison v. Frisby*, 1890, 43 Ch. D. 106).

(2) (a) The Real Property Limitation Act, 1833, and the Real Property Limitation Act, 1874, provide a period of limitation of twelve years for all actions and proceedings to recover land or rent other than land or rent belonging to spiritual and eleemosynary corporations sole and land belonging to the Crown. Special provisions are made by the first of these statutes for actions, etc., to recover land or rent belonging to spiritual or eleemosynary corporations sole and to recover rights of presentation to benefices. On the expiration of the prescribed period of limitation not only is the remedy by action barred, but the title of the persons against whom the statute has run is extinguished.

Land as used in these statutes includes "manors, messuages, and all other corporeal hereditaments whatsoever, and tithes (other than tithes

belonging to a spiritual or eleemosynary corporation sole), and any shares, estate, or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure." Rent as used in most sections of the Real Property Limitation Acts does not mean rent reserved, but rent existing as an inheritance; rent, as defined in the interpretation clause, includes "all heriots and all services and suits for which a distress may be made, and all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." Rent charged on land outside England or Ireland is not within the Real Property Limitation Acts (*Pitt v. Lord Dacre*, 1876, 3 Ch. D. 295). Except that a right to recover a particular heriot would be barred in six years under sec. 42 of 3 & 4 Will. IV. c. 27, the Real Property Limitation Acts do not affect either heriot custom or heriot service (*Zouche v. Dalbiac*, 1875, L. R. 10 Ex. 172). Reliefs are unaffected by the Acts. Quit-rents, whether arising out of freehold or copyhold lands, are within the word rent. Tithe rent-charge (except that belonging to spiritual or eleemosynary corporations sole) comes within the word rent, and is liable to be extinguished by non-payment for twelve years (*Irish Land Commissioners v. Grant*, 1884, 10 App. Cas. 14); money tithes payable on houses in the city of London by 37 Hen. VIII. c. 12 are rent within these Acts, and the right to such tithes in lay hands is barred by non-payment for twelve years (*Payne v. Esdaile*, 1888, 13 App. Cas. 613).

*Property of Spiritual and Eleemosynary Corporations Sole.*—The period of limitation for a proceeding by any "archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole" to recover land or rent is the period during which two persons in succession have held the office or benefice in respect whereof the land is claimed, and six years after a third person has been appointed thereto, if the times of such two incumbencies and the term of six years taken together amount to sixty years; if the time of the two incumbencies and the term of six years do not taken together amount to sixty years, the period of limitation is sixty years (3 & 4 Will. IV. c. 27, s. 29). Tithes belonging to spiritual and eleemosynary corporations sole are excluded by the definition clause of 3 & 4 Will. IV. c. 27, and are not affected by any statute. Tithe rent-charge being "rent" within the definition clause comes within the provision of the 29th section when in the hands of any spiritual or eleemosynary corporation sole (*Irish Land Commissioners v. Grant*, 1884, 10 App. Cas. at p. 29); so do money payments in lieu of tithes payable under 37 Hen. VIII. c. 12 in respect of houses in the city of London (*Payne v. Esdaile*, 1888, 13 App. Cas. 613). The Tithe Commutation Act (6 & 7 Will. IV. c. 71, ss. 81 and 82) limits the amount of tithe rent-charge recoverable to two years' arrears; and by the Tithe Act, 1891 (54 Vict. c. 8, s. 10), proceedings for the recovery of the tithe rent-charge must be commenced before the expiration of two years from the date at which it became payable.

*Presentations and Advowsons.*—If a stranger usurps a presentation to a benefice, the rightful patron loses his right to present for that turn unless he brings an action to enforce his right within six months of the induction of the presentee (Statute West. 2, 13 Edw. I. c. 5). The presentation by a stranger, and the failure of the rightful patron to pursue his remedy within six months, do not displace the estate of the patron, but he may present or bring an action to enforce his right on the next avoidance of the benefice (7 Anne, c. 18). The period of limitation during which the patron

can enforce his right is provided for by 3 & 4 Will. IV. c. 27, s. 30, by which no person can bring an action to enforce his right to present to an ecclesiastical benefice as the patron after the expiration of the period of the incumbencies of three clerks in succession who have obtained the benefice adversely to the patron's right, if the times of such incumbencies taken together amount to sixty years; if the times of the three incumbencies taken together do not amount to sixty years, the period of limitation is sixty years. By sec. 33 no person can bring an action to enforce a right to present to an ecclesiastical benefice as patron after the expiration of a hundred years from the time at which a clerk has obtained possession of the benefice adversely to the patron's right. The same periods apply to the case of a bishop claiming a right as patron to collate to or bestow any ecclesiastical benefice.

(b) *Real Property of the Crown and the Duchy of Cornwall*.—The Crown is not affected by any statute in which it is not named, and therefore the Statutes of Limitations in general have no application to the Crown. But with reference to real property claimed by the Crown, the Nullum Tempus Act (9 Geo. III. c. 16) provides a period of limitation of sixty years to the claim of the Crown to any manors, lands, tenements, rents, tithes, or hereditaments (other than liberties or franchises), unless the Crown shall have received the rents or profits thereof or of some manor or other hereditament of which the premises are part within the said space of sixty years, or unless the same shall have been "in charge to" the Crown, or "have stood *insuper* of record" during that time (see Coke, 3 *Inst.* 188–191). After the lapse of sixty years the subject is secured in the quiet enjoyment of the property both against the Crown and all persons claiming under the Crown; also, all fee-farm or other rents which have been paid out of manors, lands, etc., to which the subject's title is established by the Act, are by the statute secured to the Crown, if they have been paid within sixty years of any action brought to recover such rents. Where the rents and profits of any lands are in charge with the proper officers of the revenue, such rents and profits are to be considered duly in charge within the meaning of the statute; but no putting in charge of manors or lands which have been virtually out of charge is to be deemed a putting in charge, unless thereupon such manors or lands have been in some suit on behalf of the Crown adjudged to belong to the Crown within the period of sixty years (ss. 2 and 10; see 3 *Inst.* 189). By 24 & 25 Vict. c. 62, s. 1, if any person or someone through whom he claims has held any manors or hereditaments (other than liberties or franchises) for sixty years, the Crown cannot sue such person by reason only that such manors, etc., shall have been in charge to the Crown or stood *insuper* of record within such sixty years, but such having been in charge and such standing *insuper* of record shall be against such person and all claiming under him of no force. By sec. 3 of the same Act if any person has held lands for sixty years, the Crown is not to be deemed to have been answered the rents or profits of such lands, etc., by reason only of such lands having been part of any honour or manor or other hereditament of which the rents or profits shall have been answered to the Crown, or of any honour, etc., which shall have been duly in charge or stood *insuper* of record (s. 3).

For claims by the Duke of Cornwall to lands, etc., within the county of Cornwall (other than liberties or franchises and other than mines, minerals, stone, or substrata) the period of limitation is sixty years (7 & 8 Vict. c. 105, ss. 71–88). The claims of the Duke of Cornwall to mines, minerals, stones, or *substrata* are barred by sixty years' possession of the land, if the mines, etc., have been substantially worked at any time during that period by the

person in possession, and the mines have not during that period been worked or the tolls or other profits received by the Duke (s. 73). The claims of the Duke to such mines, etc., are barred by the possession of the lands for a hundred years without interruption or disturbance, if the mines have not during that period been worked or the tolls, etc., received by the Duke (s. 74). The right of the Duchy to any navigable river, estuary, port, or branch of the sea and the soil thereof, and to the shores between high and low water-mark, is excepted from the operation of the Act (s. 86).

(3) (a) *Penal Actions*.—An action for penalties, where the whole penalty is given to the Crown, must be brought within two years; when the penalty goes partly to the Crown and partly to the informer, the action must be brought within one year by the informer, and within two years after the end of that year by the Crown (31 Eliz. c. 5, s. 5). An action for penalties given to the party grieved must be brought within two years (3 & 4 Will. IV. c. 42, s. 3).

(b) *Criminal Proceedings and Summary Proceedings before Magistrates*.—

(α) For *criminal proceedings* in general there is no period of limitation; prosecutions for felonies and misdemeanours may in general be commenced at any distance of time from the commission of the offence. In some cases, however, the time for commencing criminal proceedings has been limited by statute, e.g. in a prosecution for high treason "whereby corruption of blood may be made," or for misprision of such treason the indictment must be found within three years (7 & 8 Will. III. c. 3).

Other Acts fixing a period of limitation for criminal proceedings are 9 & 10 Will. III. c. 35 (or 32); 11 & 12 Vict. c. 12; 60 Geo. III. and 1 Geo. IV. c. 1; the Customs Consolidation Act, 1876, s. 257; the Night Poaching Act, 1828; and the Criminal Law Amendment Act, 1885.

(β) *Summary Proceedings before Justices*.—By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), summary proceedings before justices must, in the absence of any special limitation, be instituted within six calendar months (s. 11; see *Jacomb v. Dodgson*, 1863, 3 B. & S. 461; 32 L. J. M. C. 113); this limitation relates only to complaints "upon which a justice may make an order for payment of money or otherwise," and does not apply to purely ministerial acts such as proceedings for enforcing a rate (*Sweetman v. Grant*, 1868, L. R. 3 Q. B. 262; and see *Darby and Bosanquet*, 2nd ed., p. 530).

(c) *Miscellaneous Limitations*.—A great number of Acts provided different periods of limitation for actions against persons for anything done under the authority or in pursuance of these Acts (see *Darby and Bosanquet*, 2nd ed., 577). Most of these Acts have been repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which provides a uniform period of limitation of six months for "any action, prosecution, or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any Act of Parliament."

## II. WHEN DOES THE TIME BEGIN TO RUN UNDER THE STATUTES OF LIMITATIONS?

(a) The point from which the time is calculated under the Limitation Act, 1623, and the 3 & 4 Will. IV. c. 42, is the same, namely the accrual of the cause of action.

(α) *Actions of Contract*.—In an action on an executory promise the cause of action is the breach, and time runs not from the promise but from the breach (*Gould v. Johnson*, 1702, 2 Salk. 422; *East India Co. v. Paul*, 1849, 7 Moo.

P. C. 85). In a promise to pay on demand, the demand is immaterial, and time runs from the date of the promise (*Collins v. Benning*, 1701, 12 Mod. 444; *In re Brown*, [1893] 2 Ch. 300). In the case of goods bargained and sold, the time would run from the date of the bargain; in the case of goods sold and delivered, from the date of delivery. But if goods are sold on credit, time runs from the expiration of the period of credit (*Helps v. Winterbottom*, 1831, 2 Barn. & Adol. 431). In the case of work done, the cause of action for the price of the work accrues when the work is done, unless there is a contract that the work should be paid for out of a specified fund (*In re Kensington Station Act*, 1875, L. R. 20 Eq. 197; *In re Gloucester, etc., Ry. Co.*, 1860, 2 Gif. 47).

In the case of work done by a solicitor, as the solicitor is engaged to carry on the work to its completion, the solicitor, unless in peculiar circumstances which would justify his discontinuing the work, cannot sue for his costs until the work is finished; the statute therefore runs from the date of the completion of the work, not from the date of the items (*Harris v. Osbourn*, 1835, 2 C. M. & R.; *Martindale v. Falkner*, 1846, 2 C. B. 706; *Whitehead v. Lord*, 1852, 7 Ex. Rep. 691). This is the common law rule, but it is not necessarily applicable to long and complicated Chancery and Bankruptcy proceedings; in the course of such proceedings a solicitor may deliver separate bills (*In re Hall & Barker*, 1878, 9 Ch. D. 538; *In re Nelson, Son, & Hastings*, 1885, 30 Ch. D. 1). If a solicitor delivered separate bills in such a case, he would have a separate cause of action on each bill, but he might, if he chose, treat the whole proceeding as one business, and, if he did, time would not run against him until it was ended (*In re Cartwright*, 1873, L. R. 16 Eq. 469). Although a solicitor cannot sue for his costs until after one month from the date of the delivery of his bill, the statute begins to run against him from the time of the completion of the work, and not from the expiration of the month (*Coburn v. Colledge*, [1897] 1 Q. B. 702).

In an action for money paid by mistake, notice of the mistake must be given and demand made, and therefore, it seems, time does not begin to run until after demand (*Freeman v. Jeffries*, 1869, L. R. 4 Ex. 189). In an action on a bill payable at sight, the statute runs from the presentment of the bill (*Dixon v. Nuttall*, 1834, 1 C. M. & R. 307; *Holmes v. Kerrison*, 1810, 2 Taun. 323; 11 R. R. 594; *In re Boyse*, 1886, 33 Ch. D. 612); if the bill is payable at a specified period after sight or demand, the statute does not run till the expiration of such period (*Thorpe v. Booth*, 1826, Ry. & M. 388). If a bill is payable on demand, the statute runs from the date of the making or accepting (*Christie v. Fonsick*, 1812, 1 Selw. N. P. 301; *Rumball v. Ball*, 1712, 10 Mod. 38; *In re George*, 1890, 44 Ch. D. 627). If a bill is payable on the expiration of a specified period, three days of grace, unless the bill otherwise provides, are to be added to the period fixed for payment, and the cause of action accrues on the last day of grace, and the time does not run till then. No action can be brought until after the expiration of the last day of grace (*Kennedy v. Thomas*, [1894] 2 Q. B. 759; see *Morris v. Richards*, 1881, 45 L. T. 210; *Dechène v. City of Montreal*, [1894] App. Cas. 640; Bills of Exchange Act, 1882, s. 14 (a) and (b)).

Upon a contract to indemnify, the statute runs from the time when the plaintiff is actually damaged, not from the time when the event happens which causes the loss (*Collinge v. Heywood*, 1839, 9 Ad. & E. 633; *Tunstall v. Bartlett*, 1866, 14 L. T. N. S. 400). In an action by an accommodation acceptor against the drawer of a bill, the implied contract is one of indemnity, and the statute runs from the actual payment by the accommodation acceptor,

and not from the time at which the bill becomes payable (*Reynolds v. Doyle*, 1841, 2 Sco. N. R. 45; *Angrove v. Tippet*, 1865, 11 L. T. N. S. 708). As between creditor and surety the statute runs in favour of the surety as soon as he becomes liable to make a payment to the creditor (*Colvin v. Buckle*, 1841, 8 Mee. & W. 680; *Holl v. Hadley*, 1835, 2 Ad. & E. 758). As between co-sureties the statute does not begin to run against a co-surety suing for contribution until the liability of the surety has been ascertained, i.e. until the claim of the principal has been established against the surety, although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety (*Wolmershausen v. Gillick*, [1893] 2 Ch. 514). The same principle applies to the case of a trustee claiming contribution from a co-trustee (*Robinson v. Harkin*, [1896] 2 Ch. 415).

On the dissolution of a partnership the statute runs against a claim brought by one of the former partners against another from the time of the dissolution (*Noyes v. Crawley*, 1879, 10 Ch. D. 31); as between a surviving partner and the representatives of a deceased partner, the statute begins to run at the date when the partnership estate is vested in the surviving partner (*Knox v. Gye*, 1871, L. R. 5 H. L. 656; but see *Bejemann v. Bejemann*, [1895] 2 Ch. 474).

(3) *Torts*.—In an action of trover, the time runs from the conversion, even if the plaintiff is ignorant of it (*Granger v. George*, 1826, 5 Barn. & Cress. 149; *Trotter v. Maclean*, 1879, 13 Ch. D. 574). If the conversion is concealed by the fraud of the defendant, time does not run until the fraud has been discovered or might with reasonable diligence have been discovered (*Ecclesiastical Commissioners for England v. North-Eastern Ry. Co.*, 1877, 4 Ch. D. 845). So in an action for fraudulent misrepresentation, time does not run until the fraud has been discovered or the plaintiff had reasonable means of discovering the fraud (*Gibbs v. Guild*, 1882, 9 Q. B. D. 159).

In the case of detinue, time runs from the moment when the possession of the defendant becomes unlawful. When goods or money have been deposited for safe custody, the statute does not run until they have been demanded back (*Wilkinson v. Verity*, 1871, L. R. 6 C. P. 206; *In re Tidd*, [1893] 3 Ch. 194).

In an action of slander, when the words themselves are not actionable without special damage, time will not run until the accrual of the special damage (*Saunders v. Edwards*, 1663, 1 Sid. 95).

In false imprisonment, a fresh cause of action arises as long as the imprisonment continues (*Coventry v. Apsley*, 1691, 2 Salk. 420); in malicious prosecution, time runs from the putting the law in motion, and there is no continuing cause of action (*Violet v. Sympson*, 1858, 8 El. & Bl. 344).

In actions of tort, when the consequential damage is the ground of action, time runs from the date of the damage, and not from the date of the act which causes the damage (*Bonomi v. Backhouse*, 1858, 9 El. B. & E. 622; 9 H. L. 503). If there is a continuance of the act causing damage, a fresh cause of action arises from time to time (*Whitehouse v. Fellows*, 1851, 10 Q. B. N. S. 765). If damage is done to the plaintiff's land by the excavation of the defendant, and afterwards a fresh subsidence causing fresh damage takes place, this fresh subsidence causing fresh damage gives rise to a new cause of action (*Darby Main Colliery Co. v. Mitchell*, 1886, 11 App. Cas. 127).

A cause of action cannot exist "unless there be also a person in existence capable of suing." If a person to whom a cause of action would have accrued, if he were living, dies intestate, the statute does not begin to run until letters of administration have been taken out (*Murray v. East India*



*Co.*, 1821, 5 Barn. & Ald. 204; 24 R. R. 325). If such a person die leaving an executor, the cause of action accrues to the executor (*Darby and Bosanquet*, 2nd ed., 48).

If the person against whom a cause of action would have accrued, if he were living, die before the time when the cause of action would have accrued, the statute does not run until there is a personal representative who can be sued (*Douglas v. Forrest*, 1828, 4 Bing. 704).

(b) *Recovery of Money Charged on Land, etc.*—Under sec. 8 of 37 & 38 Vict. c. 57 the period of limitation is reckoned from the time when a present right to receive the money has accrued to some person capable of giving a discharge. A legacy is payable in ordinary cases a year after the testator's death, and time would generally run against the right to recover a legacy from the expiration of that period. In the case of an annuity a present right to receive only arises and time only runs when each periodical payment falls due. An annuity charged on land is rent within the meaning of 3 & 4 Will. iv. c. 27, and 37 & 38 Vict. c. 57, and may be extinguished by virtue of that Act, if no instalments are paid for twelve years from the time when a right to receive an instalment has accrued, but the right to the instalments of an annuity payable out of personally only is not extinguished by non-payment. Against the general right to administration time runs from the end of the year after the testator's decease, but against the right of a residuary legatee to assets which are set apart for purposes taking precedence of the legacy, time does not run until the purposes fail; and the right of the residuary legatee to recover particular assets does not accrue until the assets have come into the executor's hands. A legatee cannot have a present right to receive any assets until there are assets available in the course of the administration for the payment of the legacy (*Faulkner v. Daniel*, 1843, 3 Hare, 199, 212). If a legacy is demonstrative and is directed to be paid out of a reversionary fund, time does not run against the legatee's right till the reversion falls in (*Earle v. Bellingham* (No. 2), 1858, 24 Beav. 448; *Seager v. Aston*, 1851, 26 L. J. Ch. 809). If a legacy is given generally and the only available assets are reversionary or contingent interests, the question when time begins to run depends upon the question whether such interests, while remaining reversionary and contingent, could properly be turned into money and applied in payment of the legacy; if they could be so applied, time would run from the date when they became applicable (*In re Blackford*, 1884, 27 Ch. D. 676; *In re Johnson*, 1885, 29 Ch. D. 964; *In re Owen*, [1894] 3 Ch. 220).

(c) *Rights to Real Property.*—By the 2nd section of 37 & 38 Vict. c. 57, which provides the period of limitation within which most claims to real property must be enforced, no person can make an entry or distress or bring an action or suit to recover any land or rent but within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to some person through whom he claims; if such right shall not have accrued to any person through whom he claims, the entry or distress must be made or the action brought within twelve years next after the time at which the right to make the entry, etc., or to bring the action shall have first accrued to the person who makes the entry, etc., or brings the action. Rent, as here used, means generally rent existing as an inheritance, and not rent reserved. Every case which falls within the terms of this section is governed by its provisions—*eg.* when no payment of an annuity charged on land has been made, the annuity is extinguished twelve years after the first right to distrain accrues after the testator's death. In those cases in which doubt

and difficulty might occur a number of provisions of 3 & 4 Will. iv. c. 27, and 37 & 38 Vict. c. 57 explain "the time at which the right to make an entry or distress or to bring an action shall be deemed to have first accrued" (see *James v. Salter*, 1837, 3 Bing. N. C. at p. 553). These provisions are to be found in the 3rd, 4th, 6th, 7th, 8th, and 9th sections of 4 Will. iv. c. 27, and the 2nd section of 37 & 38 Vict. c. 57.

The effect of the expiration of the statutory period of limitation for actions to recover real property is not only to bar the right of action of the person against whom time is, but to extinguish his title altogether (3 & 4 Will. iv. c. 27, s. 34).

### III. EFFECT OF DISABILITY, ACKNOWLEDGMENT, AND PART-PAYMENT IN PREVENTING THE OPERATION OF THE STATUTES OF LIMITATIONS.

(1) *Disabilities*.—(a) Under the Limitation Act, 1623, s. 27, as altered by the Mercantile Law Amendment Act, 1856, s. 10, and 4 & 5 Anne, c. 3, s. 19, and by the Married Women's Property Act, 1882, if at the time of the accrual of the cause of action the person to whom a cause of action has accrued be an infant or of unsound mind, or if the person against whom a cause of action has accrued be beyond the seas (i.e. be out of the United Kingdom of Great Britain or Ireland or the Isle of Man or the Channel Isles or the adjacent islands), the statute does not run until the person to whom the cause of action has accrued comes of age or recovers from his insanity, or the person against whom the cause of action has accrued comes from beyond the seas. The absence beyond the seas of one of two or more "joint debtors" is provided for by sec. 11 of 19 & 20 Vict. c. 27. As to the effect of successive disabilities and the right of personal representatives of persons dying under disability, see Darby and Bosanquet, 2nd ed., p. 61.

(b) The provisions of 3 & 4 Will. iv. c. 42, s. 4, as altered by the Mercantile Law Amendment Act, are now practically the same as those of the Limitation Act, 1623, as amended by the statutes given above.

(c) As to 37 & 38 Vict. c. 57, s. 8, there is no express provision for disabilities, but the disabilities of infancy and lunacy are practically provided for, as a present right to receive the money cannot in the case of infancy or lunacy accrue to "some person capable of giving a discharge for the same." The disability of marriage has been removed by the Married Women's Property Act, 1882.

(d) As to sec. 42 of 3 & 4 Will. iv. c. 27, there is no provision express or implied for disabilities.

(e) As to real property, the provisions relating to disabilities are to be found in the 3rd, 4th, and 5th sections of 37 & 38 Vict. c. 57, and the 18th section of 3 & 4 Will. iv. c. 27, as altered by the 9th section of 37 & 38 Vict. c. 57. The disabilities provided for are infancy, coverture, and lunacy. Coverture since the Married Women's Property Act, 1882, can now only be a disability when the marriage has taken place and the wife's title to the property has accrued before the 1st January 1883. No provisions are made for disabilities in actions to recover rights of presentation to a benefice (Darby and Bosanquet, 2nd ed., p. 491).

(2) *Acknowledgments and Part-Payment*.—(a) Under the Limitation Act, 1623.

(a) *Acknowledgments*.—This Act contained no specific provision as to acknowledgment of indebtedness, but by the interpretation put upon it an acknowledgment of a debt, which by Lord Tenterden's Act (9 Geo. iv. c. 14, s. 1) must be in writing, but need not be stamped (*ibid.* s. 8), takes a

debt out of the operation of the statute. The effect of an acknowledgment is confined to cases of debt and cannot apply to cases of tort or to unliquidated damages for breach of contract (see Darby and Bosanquet, 2nd ed., p. 105). The leading case on acknowledgments under this Act is *Tanner v. Smart*, 1827, 6 Barn. & Cress. 603, which decides that upon a general acknowledgment a general promise to pay may and ought to be implied, but that nothing can take a debt out of the statute, unless it amounts to an express promise to pay or an unconditional acknowledgment of the debt from which such an express promise may be implied. The question whether an acknowledgment is sufficient or enough to amount to a promise to pay must depend upon the words of each particular acknowledgment. For instances of sufficient and insufficient acknowledgments, see Darby and Bosanquet, 2nd ed., pp. 69 to 91. Sec. 13 of the Mercantile Law Amendment Act, 1856, provides for an acknowledgment by an agent, and sec. 1 of 9 Geo. IV. c. 14 contains the provisions relating to an acknowledgment by one joint contractor. Acknowledgment to an agent has the same effect as acknowledgment to a principal (*Bewley v. Power*, 1833, Hayes & J. 368; *Edmonds v. Goater*, 1852, 15 Beav. 415); but acknowledgment to a stranger under this Act is altogether inoperative (*Grenfell v. Girdlestone*, 1837, 2 Y. & C. Ex. 676).

(b) *Part-Payment*.—By the judicial interpretation of the Limitation Act, 1623, part-payment of principal or payment of a debt takes the debt out of the operation of the statute, and the effect of such a payment is recognised and preserved by Lord Tenterden's Act (9 Geo. IV. c. 14, s. 1). The principle of the doctrine of part-payment or payment of interest is that any such payment is an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue. Payment by an agent has the same effect as payment by the principal, and payment to an agent the same effect as payment to the principal. The payment need not be actually made in money, but any mutual agreement which is intended to have the effect of discharging the party indebted will have the same effect as actual payment in money (*Worthington v. Grimsditch*, 1845, 7 Q. B. 479). When there are debts due on both sides, and the accounts are gone through and a balance struck, this amounts to a payment on either side (*Ashby v. James*, 1843, 11 Mee. & W. 542). As to the effect of part-payment or payment of interest by one of several contractors or one of several executors and administrators, see sec. 14 of the Mercantile Law Amendment Act, 1856.

(b) Acknowledgments and part-payment under 3 & 4 Will. IV. c. 42, s. 5. Express provisions are made by this section exempting a specialty debt from the operation of the statute, when an acknowledgment in writing has been made by the party liable or his agent, or by part-payment on account of principal or interest. The principles governing acknowledgments under this Act are altogether different from the principles governing acknowledgments under the Limitation Act, 1623. An acknowledgment even if made to a stranger is operative under this Act, while it would be wholly inoperative under the Limitation Act, 1623. Under 3 & 4 Will. IV. c. 42, an acknowledgment cannot operate as a new promise, as a promise by specialty cannot be supported by a promise not by specialty. The question whether a payment is an acknowledgment that more is due will be the same under this statute as under the Limitation Act, 1623.

(c) Acknowledgments and part-payment under 37 & 38 Vict. c. 57, s. 8, and sec. 42 of 3 & 4 Will. IV. c. 27. Payment of some part of the principal or some interest or an acknowledgment of the right given in writing by

the person by whom the money is payable or his agent to the person entitled thereto or his agent, keeps alive the right of action in cases governed by sec. 8 of 37 & 38 Vict. c. 57. A similar acknowledgment of arrears keeps alive the right in cases governed by sec. 42 of 3 & 4 Will. iv. c. 27.

(d) *Acknowledgment of Title to Real Property.*—By the 14th section of 3 & 4 Will. iv. c. 27 an acknowledgment of title given in writing to the person entitled to land or rent by the person in possession or in receipt of the profits or in receipt of the rent or his agent is tantamount to possession of the land or receipt of the rent, and prevents the statute running against the person entitled. Signature of such an acknowledgment by an agent is insufficient (*Ley v. Peter*, 1858, 3 H. & N. 101), but signature by the direction of the person in possession in his presence is of the same effect as signature by the person in possession himself (*Lessee of Corporation of Dublin v. Judge*, 1847, 11 Ir. L. R. 8). No particular form of acknowledgment is necessary, but anything from which an admission of ownership in the person to whom it is given is sufficient (*Incorporated Society v. Richards*, 1841, 1 Dr. & War. 258). There is an important distinction between the acknowledgment of title to real property and the acknowledgment of a debt. An acknowledgment of a debt is good even if made after the expiration of the statutory period of limitation, because those Statutes of Limitation which apply to personal actions only bar remedy and do not extinguish the right. But sec. 34 of 3 & 4 Will. iv. c. 27 extinguishes the title of the person out of possession after the lapse of the statutory period, and no acknowledgment subsequent to the lapse can revive the right (*Saunders v. Saunders*, 1882, 19 Ch. D. 373).

*Mortgagor and Mortgagee.*—The provisions of sec. 14 of 3 & 4 Will. iv. c. 27, which have been just referred to, would operate to preserve the mortgagee's right to the mortgaged land, if a written acknowledgment of title were given by the person in possession. The mortgagee's right to recover land (but not rent) is also kept alive by the payment of any part of the principal money or the interest secured by the mortgage in consequence of the provisions of 7 Will. iv. & 1 Vict. c. 28, which preserves the mortgagee's right of entry for twelve years next after such payment. But the payment must be by a person liable as mortgagor or by some person on his behalf, and neither payment nor acknowledgment would be of any effect if made after the statute has run against the mortgagee, except when an acknowledgment, if made by deed, might operate by way of estoppel (*Hemming v. Blanton*, 1873, 42 L. J. C. P. 158; *Gregson v. Hindley*, 1846, 10 Jur. 383; *Kibble v. Fairthorne*, [1895] 1 Ch. 219).

The provisions relating to acknowledgments as keeping alive the mortgagor's right to redeem are to be found in the 7th section of 37 & 38 Vict. c. 57. By this section time does not run against the mortgagor's right, if an acknowledgment in writing of the mortgagor's title is given to the mortgagor or some person claiming his estate, or to the agent of the mortgagor or person so claiming, signed by the mortgagee or person claiming through him. Such an acknowledgment must be given before the expiration of the statutory period or it will have no effect.

*Dower.*—In the case of arrears of dower which by the 41st section of 3 & 4 Will. iv. c. 27 cannot be recovered for a longer period than six years, no provision is made for the giving of any acknowledgment.

*Right of Presentation.*—No provision is made for acknowledgments in actions respecting rights of presentation, the limitation of which is provided by secs. 30 to 33 of 3 & 4 Will. iv. c. 27.

## IV. CASES TO WHICH THE STATUTES OF LIMITATIONS DO NOT APPLY.

*Trustees, etc.*—When any person is in receipt of money or is in possession of land, etc., as trustee, agent, partner, guardian, or in any other fiduciary capacity, the Statutes of Limitations do not run against such a person. This was the rule of Courts of equity, and was made a statutory provision by the Judicature Act, 1873, s. 25, subs. 2, that no claims of a *cestui-que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations. And by sec. 25 of 3 & 4 Will. iv. c. 27 the right of a *cestui-que trust* to bring a suit against a trustee to recover land or rent is to be deemed to have first accrued at and not before the time at which the land or rent is conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

The Trustee Act, 1888, gives some protection to trustees in allowing them in certain cases to avail themselves of the benefits of the Statutes of Limitations and of lapse of time as a defence in actions brought against them. This Act does not apply where the claim against the trustee is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by him and converted to his use. As to the interpretation put on this Act, see *Wassell v. Leggatt*, [1896] 1 Ch. 554; *Collings v. Wade*, 1896, 1 Ir. R. 340; *Leahy v. De Moleyns*, 1896, 1 Ir. R. 206; *How v. Earl Winterton*, [1896] 2 Ch. 626; *Somerset v. Poulett*, [1894] 1 Ch. 231; *Want v. Campaign*, 1893, 9 T. L. R. 254; *Thorne v. Heard*, [1893] 3 Ch. 530; [1894] 1 Ch. 599; [1895] App. Cas. 495; *Mara v. Browne*, [1895] 2 Ch. 69; [1896] 1 Ch. 199; *Moore v. Knight*, [1894] 1 Ch. 547; *In re Swain*, [1891] 3 Ch. 233; *In re Page*, [1893] 1 Ch. 304; *In re Bowden*, 1890, 45 Ch. D. 444; *In re Gurney*, [1893] 1 Ch. 590.

*Fraud.*—Where the discovery of a cause of action is prevented by fraud, the statute does not run until the fraud has been discovered, or might with reasonable diligence have been discovered (*Ecclesiastical Commissioners for England v. North-Eastern Ry. Co.*, 1877, 4 Ch. D. 845). Where there has been fraudulent misappropriation, the statute does not run till the discovery of the fraud (*In re Crosley*, 1887, 35 Ch. D. 266). Generally, the exception of fraud from the operation of the statutes ceases when the facts have been discovered; but as between partners concealed fraud is a bar to the operation of the statutes, even if such fraud might have been discovered at the time if reasonable caution had been used, a partner being entitled to rely on the good faith of his partners (*Betjemann v. Betjemann*, [1895] 2 Ch. 474). With reference to real property the 26th section of 3 & 4 Will. iv. c. 27 provides that in case of concealed fraud the right shall be deemed to have accrued at and not before the time at which the fraud shall or with reasonable diligence might have been first known or discovered.

*Petition of Right.*—No Statute of Limitation applies to a petition of right, and the Crown cannot plead any statute in answer to such a petition (*Rustomjee v. R.*, 1876, 1 Q. B. D. 487) except in the case of a petition of right in respect of the personal estate of any deceased person, as to which see 47 & 48 Vict. c. 71, s. 3.

*Crown Debts.*—The Crown is not affected by the Statutes of Limitations except those which expressly refer to real property belonging to it. A Crown debt is not barred by any lapse of time, and, if a debt not barred

by the statute is vested in the Crown, it will never be barred as against the Crown.

*Action in rem.*—An action *in rem* for damages to a ship by collision is not within the Statute of James or within any Statute of Limitations. See COLLISIONS AT SEA.

*Action for a Mandamus.*—No Statute of Limitations applies to an action for a *mandamus*, but the granting of a *mandamus*, being within the discretion of the Court, would probably be refused if applied for when there has been a considerable interval of time after the default in consequence of which the *mandamus* is asked for.

[*Authorities.*—Darby and Bosanquet's *Statutes of Limitations*, 2nd ed., 1893; Hewitt on the *Statutes of Limitations*, 1893.]

**Limitation of Liability.**—As already seen under COLLISIONS AT SEA, the owner of a ship, whether British or foreign, is entitled in the following cases—viz. where loss of life or personal injury is caused to any person being carried in his ship, or where damage or loss is caused to any goods, merchandise, or other things on board his ship, or where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of his ship, or where any loss or damage is caused to any other vessel, or any goods, etc., on board any other vessel, by reason of the improper navigation of his ship—in each case such loss, damage, or injury, being without his actual fault or privity, to limit his liability in respect of loss of life or personal injury, either alone or together with loss of or damage to goods, etc., to £15 for each ton of his ship's tonnage, and in respect of loss of or damage to vessels, goods, etc., whether there be in addition loss of life or personal injury or not, to £8 for each ton of his ship's tonnage (s. 503 (1) of M. S. A. 1894). This limitation of liability may be in contract as well as in tort, *e.g.* a railway company which carries passengers by sea may limit its liability to them (*L. & S.-W. Ry. Co. v. James*, 1872, L. R. 8 Ch. 241). Except where the loss or injury is to persons or things on board the shipowner's ship, limitation of liability is only allowed in cases of collision between two ships, whether belonging to the same owner or not (*The Petrel*, [1893] Prob. 320), and is not applicable where the ship collides with a wall, pier, etc., for her liability is then unlimited. In cases of collision between two ships (and a yacht is a "ship"), the right to limit liability may be excluded by contract between the two shipowners, *e.g.* rules of a yacht regatta, under which any yacht fouling another in consequence of neglect of the racing rules was bound to pay "all damages" (*The Satanita*, [1897] App. Cas. 59). The words "improper navigation" include improper overlooking of machinery on shore, owing to which the ship steered badly and caused a collision (*The Warkworth*, 1884, 9 P. D. 145); and a tug towing another ship and running her aground by disobeying the pilot's orders, can limit her liability for the damage so caused (*Wahlberg v. Young*, 1876, 4 Asp. 27 n.). The payment of the amount of the limit of liability in the particular case does not put the shipowner in the position of never having been a wrongdoer, and thus he cannot detain the cargo for salvage or general average incurred in extricating it from a dangerous position due to his fault, *e.g.*, sunk (*The Ettrick*, 1881, 6 P. D. 127). The owner's or part-owner's presence on board the ship, if he is not in charge of her at the time of a collision caused by her negligent navigation, does not constitute "actual fault or privity" on his part which will deprive him of the right to limit his

liability (*The Obey v. Le Gros*, 1866, L. R. 1 Ad. & Ec. 102; *The Empusa*, 1879, 5 P. D. 6; *The Satanita*, above); and if a part-owner is "privy" to the improper navigation of the ship, that does not prevent his co-owners from limiting their liability (*The Spirit of the Ocean*, 1865, B. & L. 336). If a loss of cargo for which the shipowner is responsible does not arise directly from the collision, the shipowner cannot bar a claim by the cargo-owner against him by limiting his liability in respect of the loss caused by the collision, *e.g.* if the cargo has been transhipped after a collision caused by the carrying ship's fault, and is afterwards lost in the substituted ship (*The Bernina*, 1886, 12 P. D. 36). The M. S. A. further provides that, for purposes of limitation of liability, the tonnage of a steamship shall be her gross tonnage, without deduction on account of engine-room, and the tonnage of a sailing ship shall be her registered tonnage, provided that there shall not be included in such tonnage any space occupied by seamen or apprentices, and appropriated to their use, which is certified under the regulations scheduled to the Act with regard thereto; the tonnage of a foreign ship, if it has been or can be measured according to British law, is her tonnage for this purpose; if it has not and cannot be so measured, then her tonnage for this purpose is her tonnage as stated in a certificate of the Surveyor-General of Ships in the United Kingdom, or the chief measuring officer of any British possession abroad, of what in his judgment, based on the evidence received by direction of the Court hearing the case concerning the dimensions of the ship, her tonnage would have been if measured according to British law (s. 503). The tonnage of a ship for limitation of liability is her tonnage appearing on the official register at the time of collision (*The Dione*, 1885, 5 Asp. 347); but such registered tonnage is not conclusive, and evidence is admissible to show that it is not correct (*The Recepta*, 1889, 14 P. D. 131). There have been several decisions on the former Acts, the language of which is reproduced in this section of the present Act, as to what deductions should be allowed from the gross tonnage of a ship, the main question in such cases being whether the same deductions could be made for the purpose of limiting liability as for ascertaining the registered tonnage of a ship. The registered tonnage of a ship is her gross tonnage (minus, in the case of steamships, the engine-room space), less certain deductions allowed for (i.) any space used exclusively for the accommodation of the master, and any space occupied by seamen or apprentices and appropriated to their use, which is duly certified under the Act; (ii.) any space used exclusively for the working of the helm, capstan, and anchor gear, and for keeping charts, signals, and other instruments of navigation and boatswain's stores; (iii.) any space occupied by donkey-engine and boiler, if connected with the main pumps of the ship; and in the case of a sailing-ship, any space set apart exclusively for storage of sails, provided it does not exceed  $2\frac{1}{2}$  per cent. of the ship's tonnage, may be deducted. Except with regard to engine-room space and crew space, no deduction is allowed for any space which is not duly certified by a surveyor and marked with a notice of the purpose for which it is intended (ss. 77, 78, 79). In *The Umbilo* ([1891] Prob. 118), Sir James Hannen held that though crew space could be deducted for limiting liability, a space used exclusively for working of the helm, etc. (see (ii.), above), could not be deducted in case of a steamship, "for deductions allowable in order to ascertain register tonnage were not allowable for limiting liability. On the other hand, in *The Pilgrim* ([1895] Prob. 117), Bruce, J., held that such a navigation space could be deducted in the case of a sailing-ship, for "it was not intended that there should be two

measures, one for adopting the limit of liability, and another for other purposes," and distinguished *The Umbilo* from the case before him. There seems to be no doubt, whether deductions are allowed in respect of (ii.) and (iii.), that deductions can be made for crew space (mentioned in (i.), above), as this is provided for by sec. 503 (*q.v.*). Such a deduction for crew space can only be made, however, if the crew space is on the upper deck, and not if it is between the spar deck and tonnage deck (*The Franconia*, 1878, 3 P. D. 164; *The Palermo*, 1884, 10 P. D. 21); and also if it appears on the ship's register at the time of the collision, for it cannot be made if it only appears there at the time of applying for a decree of limitation of liability (*The John M'Intyre*, 1881, 6 P. D. 200). In case of ships built with double bottoms for water ballast, the space between, if certified by a ship surveyor to be not available for carriage of cargo, stores, or fuel, may be deducted from the gross tonnage for the purpose of limiting liability (*The Zanzibar*, [1892] Prob. 233; M. S. A., s. 81). See SHIP.

The Act further provides that the owner of every seagoing ship, or share therein, shall be liable in respect of every such loss, damage, or injury, as above described, arising on distinct occasions, as if no other loss, damage, or injury had arisen (s. 503). A "distinct occasion" is equivalent to one act of improper navigation (*The Rajah*, 1872, L. R. 3 Ad. & Ec. 539): "if the first collision is the substantial and efficacious cause of the other, and there is no separate act of negligence, it is one occasion" (*The Creadon*, 1886, 5 Asp. 585); "it is not the time between the two collisions which is the substantial thing, but whether both are the result of the same act of want of seamanship, and if they are not, the Act does not apply except as to each of them separately" (*The Schwan v. The Albano*, [1892] Prob. 419, Lord Esher, M.R.).

Where any liability is alleged to have been incurred by the owner of a ship, whether British or foreign, in respect of loss, damage, or injury as aforesaid, and several claims are made or apprehended in respect of that liability, on application by such owner the High Court in England, or a competent Court in a British possession, may determine the amount of his liability, and distribute it rateably among the several claimants, and may stay any proceedings pending in any other Court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs as the Court thinks just (s. 504). All such sums and costs paid in this way upon such limitation of liability may be brought into account among the part-owners of the ship in the same way as money disbursed for its use (s. 505). The ordinary procedure for obtaining limitation of liability is for the shipowner to bring a suit in the Admiralty Division (see vol. i. 142) for limitation of liability, admitting that his ship is to blame, but that the loss was not due to his actual fault or privity, and praying for his liability to be limited to the statutory amount. It is not, however, necessary that he should in the first place admit that his ship was in fault (*The Amalia*, 1863, B. & L. 151), for he may institute his liability suit after a cause for collision has been begun against him (which he defends), and before it has been concluded (*The Sisters*, 1875, 2 Asp. 589). He may also admit his liability in a defence to a collision action, and counter claim for a limitation of liability (*The Clutha*, 1876, 3 Asp. 225). The Admiralty Division can entertain an action for limitation of liability though the wrong-doing ship is not under the arrest of the Court, and cannot be, *e.g.* is sunk (*The Northumbria*, 1869, L. R. 3 Ad. & Ec. 24; *The Normandy*, 1870, *ibid.* 152), and interest is payable



on the statutory fund from the date of collision till payment into Court (*The Crathie*, [1897] Prob. 178), as well as costs. For details of the procedure, see Williams and Bruce, *Admiralty Practice*, pp. 372 ff.

The statutory fund is available to a claim by underwriters (*Burrell v. Simpson*, 1876, 4 Sess. Cas. (4th) 178); or the Crown (*The Zoe*, 1886, 11 P. D. 72, though the time fixed for sending in claims has gone by, and there have been some laches on the part of the Crown, on condition of the Crown paying costs); or a bottomry bondholder on freight of a ship sunk by collision (*The Empusa*, 1879, 5 P. D. 6); and where two ships collide which belong to the same owners, and one being to blame limits her liability, the master and crew of the other vessel can claim against the fund, for they are not in common employment with the crew of the former ship, though they have a common employer (*The Petrel*, [1893] Prob. 320). The Court may marshal the assets; and in an action where shipowners limited their liability to £15 per ton, and the registrar assigned the fund up to £7 per ton to claimants in respect of loss of life, and apportioned the remaining £8 per ton rateably between them and the claimants in respect of loss to property, the Court upheld his decision (*The Victoria*, 1888, 13 P. D. 125). A stay of proceedings in other actions may be ordered in respect of claims for loss of property, but it may be refused in respect of claims for loss of life and personal injury, though the plaintiff in the action of limitation of liability had paid £8 per ton into Court and had given security for the other £7 per ton (*The Nereid*, 1889, 14 P. D. 78); unless those life claims are settled, when a general stay may be allowed (*The Foscolino*, 1885, 5 Asp. 420). If a ship carrying cargo and another ship file an agreement in the registry to a decree that both ships are to blame for a collision, and the owners of cargo sue the other ship which has got its liability limited, and do not admit that the carrying ship was partly to blame for the collision, though the carrying ship cannot prove against the fund in Court for more than half her own damage, the owners of cargo may have an issue directed between the two ships to determine whether the non-carrying ship is alone to blame for the collision (*The Karo*, 1887, 13 P. D. 24). See COLLISIONS AT SEA, vol. iii. pp. 95-97.

The Act further provides that insurances against any of the risks above mentioned, happening without the shipowner's actual fault or privity, are to be valid (s. 506). See MARINE INSURANCE. In any proceedings against a shipowner for damages for loss of life, the passenger list is evidence that the person for whose death damages are claimed was on board at the time of his death (s. 507). These provisions do not lessen or take away the liability of any master or seaman as such, who is also owner or part-owner of the ship to which he belongs, nor do they extend to any British ship which is not recognised as such within the Act (s. 508); and they apply to all the Queen's dominions (s. 509). For an instance of a ship being a British ship, though not recognised as such, see *The Andalusian* (1878, 3 P. D. 182), where a ship, which in being launched, not being then registered (though she was at the time of action), collided with another, was not allowed to limit her liability; while in *The Brinio* (1891, 90 L. T. Jo. 247), a ship bought by British subjects from Dutch owners, and not yet registered when she collided with another, was allowed to limit her liability, as she was still Dutch at the time of collision.

See TUG AND TOW; COLLISIONS AT SEA; COSTS (ADMIRALTY). As to carriers, see CARRIER; RAILWAY.

[*Authorities*—See Temperley, *Merchant Shipping Act*; Marsden, *Collisions at Sea*; Williams and Bruce, *Admiralty Practice*.]

**Limitation, Words of**, are the words which limit or mark out the quantum of estate taken under a deed, instrument, or will.

As regards freeholds, the proper mode at common law of conveying the fee-simple to an individual is by a grant to him "and his heirs" (*Co. Litt.* 1 a). The words "and assigns," or "and assigns for ever," though in common use, are unquestionably superfluous.

Similarly, an estate tail was properly limited to the grantee "and the heirs of his body," "and the heirs male of his body," or "and the heirs of his body by his wife B.," as the case might be (*Co. Litt.* 21 a, 21 b).

The use of the words "and his heirs" in the limitation of a fee-simple, and the use of the word "heirs," together with words of procreation, in the limitation of an estate tail, were essential in a deed operating at common law or under the Statute of Uses.

To this rule there were certain exceptions, of which the only ones which now possess any practical importance are—

1. Direct words of reference to a complete limitation in a preceding deed would suffice.

2. Words of limitation were never required in a release by one joint-tenant to another, for the obvious reason that the release does not operate to grant an estate, but to destroy one.

3. On a partition between coparceners a rent-charge in fee-simple, granted by way of equality of exchange, required no words of limitation (see Challis on *Real Property*, pp. 194, 195, 264).

In a proper case, moreover, the appropriate words, if accidentally omitted, might be inserted, the intention of the parties being clear, under the equitable jurisdiction of RECTIFICATION (*In re Bird*, 1876, 3 Ch. D. 214).

Limitations of equitable interests in real estate, unless executory, will be construed in the same manner as would be corresponding limitations of legal estates (*In re Whiston*, [1894] 1 Ch. 661).

The Conveyancing and Law of Property Act, 1881, enacts as follows:—

Sec. 51. In a deed it shall be sufficient, in the limitation of an estate in fee-simple, to use the words in fee-simple without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

In a conveyance to a corporation sole in fee-simple the proper limitation is to the bishop or parson, as the case may be, "and his successors," and without these words nothing passes but an estate for life (*Co. Litt.* 94 b, and note 5).

There seems nothing in the above section of the Conveyancing and Law of Property Act, 1881, to alter this rule.

In the case of a corporation aggregate, however, no words of limitation are, or ever were, necessary.

In a **WILL**, technical words of limitation were never requisite for a devise of a fee-simple or estate tail, though prior to the Wills Act some words indicating an intention to give the fee were necessary.

Now, however, under sec. 28 of the Wills Act, a devise to A. simply will carry the whole deviseable interest of the testator in the estate to A., unless a contrary intention appears in the will.

In the entire absence of all words of limitation from a deed, an estate for the life of the grantee passes, if the grantor could validly grant such an estate; otherwise an estate for the life of the grantor will pass.

The rules as regards the limitation of estates in copyholds are similar to those of freeholds, with these exceptions:—

(1) Sec. 51 of the Conveyancing and Law of Property Act, 1881, *supra*, does not apply.

(2) By the special custom of certain manors, a customary estate in fee might be granted without the use of the word heirs (see Watkins, *Copyholds*, vol ii. App.).

No special words are requisite for the limitation of a term of years. Any words sufficiently indicating the commencement, duration, and mode of determination of the term are sufficient. "

**Limited Administration.**—See EXECUTORS AND ADMINISTRATORS, vol. v. at p. 190.

**Limited Interest.**—See LIMITED OWNERS.

**Limited Liability.**—The notion of a shareholder in a company being liable for the debts of the company only to a certain definite extent is quite modern. In the case of those early companies which were incorporated by royal charter, the shareholders were personally irresponsible for the companies' debts; at a later period the Crown was empowered by statute to grant charters of incorporation which should make the persons incorporated liable for the debts of the corporation, but by the Chartered Companies Act, 1837, power was given to grant letters patent to companies or bodies of person associated for trading or other purposes, in which it might be provided that the members of such companies or bodies of persons should be individually liable for the debts, etc., of such companies to such extent only per share as should be declared in the letters patent. In the case of other undertakings, such as railways and works of a like nature, incorporated by Act of Parliament, the liability of shareholders has usually been limited to the extent of their shares of the nominal capital. Limited liability, however, was brought into general practice after the passing of the Statute 18 & 19 Vict. c. 133, which enabled companies to be registered with limited liability. The governing statute now is the Companies Act, 1862, sec. 7 of which provides that "the liability of the members of a company formed under this Act may, according to the memorandum, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets in the event of its being wound up." The word "Limited" must form part of the name of a company registered under the Companies Acts, except in the case of certain associations not for profit, where the Board of Trade may grant a licence authorising the registration of such companies without the addition of the word "Limited" (Act of 1867, s. 23). See COMPANY.

[*Authority.*—Lindley, *Companies*, 5th ed., pp. 2 *et seq.*]

**Limited Owners.**—Where a person has an interest in land less than an estate in fee-simple, he is said to be a limited owner or to have a limited interest in the land. Tenants for life or in tail are, for example, limited owners (see s. 58 of the Settled Land Act, 1882). See SETTLED LAND ACTS.

**Limited Owners Residences Acts.**—By the Limited Owners Residences Acts of 1870 and 1871 (33 & 34 Vict. c. 56, and 34 & 35 Vict. c. 84) the erection of a mansion house with necessary appurtenances or the improvement of an existing mansion house, etc., are to be deemed improvements within the Improvement of Land Act, 1864, and the cost of such improvements may be charged on the settled estate. See SETTLED LAND ACTS.

**Limited Probate.**—See PROBATE.

**Limit of Deviation.**—See DEVIATION.

**Lincoln's Inn.**—See INNS OF COURT.

**Line of Buildings.**—See LONDON (COUNTY).

**Line of Rail.**—See RAIL.

**Liquidated Damages.**—See DAMAGES, vol. iv. p. 103; PENALTY.

**Liquidated Demand.**—See DEBT, ACTION OF; DAMAGES, V.; SPECIAL INDORSEMENT.

**Liquidation.**—See BANKRUPTCY; COMPANY.

**Lis alibi pendens.**—See STAY OF EXECUTION.

**Lis mota.**—This phrase is used to denote the date at which the controversy began which subsequently culminates in a lawsuit. The corresponding phrase *lis pendens* denotes that litigation has actually commenced. But a contention may be raised and a claim definitely formulated for years or even for generations before any legal proceedings are begun; and evidence which comes into existence during this interval is naturally viewed with some suspicion. Thus no entry or declaration made by a deceased person will be admissible as evidence of reputation, unless it was made *ante litem motam* (*Monkton v. A.-G.*, 1831, 2 Russ. & M. at p. 161). On the other hand, any document which comes into existence *post litem motam* for the purpose of enabling a solicitor to advise his client thereon, or obtain evidence for, or otherwise to conduct, his client's case, is privileged from the inspection of the opponent (*McCorquodale v. Bell*, 1876, 1 C. P. D. 471; *Southwark and Vauxhall Water Co. v. Quick*, 1878, 3 Q. B. D. 315). But all confidential communications which pass directly between a solicitor and his client for the purpose of enabling the solicitor to advise, or in the course

of giving advice, to the client as to his legal rights, are privileged from production and inspection, whether they were made before or after any litigation was anticipated, before or after any controversy arose (*Minet v. Morgan*, 1873, L. R. 8 Ch. 361).

There is no *lis mota* till a dispute has arisen; it is not enough that the right has vested, or that the cause of action has accrued, which afterwards becomes the subject-matter of litigation. The *dictum* of Alderson, B., to the contrary in *Walker v. Countess Beauchamp*, 1834, 6 Car. & P. at p. 561, is expressly overruled (*Shedden v. A.-G.*, 1860, 30 L. J. P. 217; 2 Sw. & Tr. 170). The dispute must relate to the particular subject which is in issue in the subsequent litigation (*Freeman v. Phillipps*, 1816, 4 M. & S. 486; 16 R. R. 524); though it need not be between the same parties (*Bullock & Co. v. Corry & Co.*, 1878, 3 Q. B. D. 356; *Pearce v. Foster*, 1885, 15 Q. B. D. 114). If no dispute has yet arisen, a declaration made by a deceased person is admissible, even though made with the express object of preventing any subsequent dispute on the matter. Thus an entry made by a father *ante litem motam* "in a family Bible or any other book, or on any piece of paper," as to the legitimacy of his son, is admissible after his death, although it was admittedly written for the express purpose of establishing such legitimacy (*Berkeley Pecrage* case, 1811, 4 Camp. at p. 418; 14 R. R. 782). If, however, a controversy has in fact arisen, although the declarant did not know it, the declaration will be rejected (*ibid.* p. 417; *Shedden v. A.-G.*, *supra*; and *cp. Frederick v. A.-G.*, 1874, 3 P. & M. 270; *In re Turner*, 1885, 29 Ch. D. 985).

The fact that the declarant was himself interested in establishing the same title as that now in dispute does not affect the admissibility of such a declaration, though it may diminish its value, when received. Thus a declaration made by a deceased daughter as to the marriage of her parents is admissible in favour of the legitimacy of all the other children (*Doe d. Jenkins v. Davies*, 1847, 10 Q. B. 314).

**Lis pendens.**—As soon as proceedings are commenced to recover or charge some specific property (*Ex parte Thornton*, 1867, 2 Ch. p. 178) there is a "*lis pendens*"—a pending suit, the consequence of which is that until the litigation is at an end neither litigant can deal with the property to the prejudice of the other. "It is scarcely correct," says Lord Cranworth, L.C., in *Bellamy v. Sabine*, 1857, 1 De G. & J. p. 578, "to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence."

A *lis pendens* will not, however, bind a purchaser of mortgagee without

express notice thereof, unless a memorandum containing the name, place of abode, and title, trade, or profession of the person whose estate is intended to be affected, and the Court, the title of the action, and the day when the action was instituted, has been left at the central office with the proper officer, who forthwith enters the same in a book in alphabetical order by the name of the person whose estate is intended to be affected by the *lis pendens* (2 & 3 Vict. c. 11, s. 7; Order 61, r. 22; *Dan. Ch. Forms*, p. 136). It is important, therefore, in many cases at once to register an action as a *lis pendens*, and a solicitor may be liable for negligence if he omits to do this (*Plant v. Pearman*, 1872, W. N. 15). The registration holds good for five years; but at the end of that time the *lis pendens* will become null and void as against purchasers, mortgagees, or creditors, unless a similar memorandum is then re-registered, and so *toties quoties* at the expiration of every five years (2 & 3 Vict. c. 11, ss. 4 and 7; and see 18 & 19 Vict. c. 15, s. 6).

By sec. 7, subsecs. 5 and 6, of the Settled Land Act, 1884 (47 & 48 Vict. c. 18), an order giving leave to exercise the powers conferred by sec. 63 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), must be registered as a *lis pendens* in order to affect any person dealing with the trustees.

A creditor's action for general administration may be a sufficient *lis pendens*, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking from a specific devisee who is a defendant, if the plaintiff, previous to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action (*Price v. Price*, 1887, 35 Ch. D. 297, where the earlier authorities are reviewed by Kay, J.); but the registration of an administration suit as a *lis pendens* will not prevent an executor from disposing of the assets and conferring a good title to them (*Neaves v. Burrage*, 1849, 14 Q. B. 504; *Berry v. Gibbons*, 1873, L. R. 8 Ch. 747); and in a suit for the dissolution of a marriage there is before decree no *lis pendens* with reference to the property included in the marriage settlements (*Wigney v. Wigney*, 1882, 7 P. D. 228).

A *lis pendens* is only notice of matters charged in the statement of claim, and not also of every equity which might possibly arise out of the matters in question in the action (*Shalcross v. Dixon*, 1838, 5 Jarm. Convey. 493); nor does it create an actual charge or lien on the property, or excuse a purchaser from completing his contract (*Bull v. Huchens*, 1863, 32 Beav. 615); and the whole doctrine of *lis pendens* is confined to interests in land, and has no application to personal estate other than leaseholds (*Wigram v. Buckley*, [1894] 3 Ch. 483).

Upon the filing at the central office of an acknowledgment by the plaintiff, a satisfaction or discharge of any registered *lis pendens* may be entered, and a certificate of the entry may be issued (23 & 24 Vict. c. 115, s. 2); and the Court before whom the property is in litigation may upon the determination of the *lis pendens*, or during the pendency thereof, if satisfied that the litigation is not prosecuted *bonâ fide* (as to which see *Strousberg v. McGregor*, 1890, 6 T. L. R. 145), make an order for vacating the registration without the consent of the party who registered it, and may direct the party on whose behalf the registration was made, to pay all the costs and expenses occasioned by the registration or vacating thereof (30 & 31 Vict. c. 47, s. 2). The application to the Court may be by petition, motion, or summons; and if an order is made for vacating the registration, the registering officer will, upon the filing with him of an office copy of the order, enter a discharge of the *lis pendens* on the register (*ibid.*).

An order to discharge the registration may be made in a subsequent action instituted for the purpose, but should as a rule be made in the

## LIST, CIVIL

matter of the former suit (*ibid.*; *Clutton v. Lee*, 1876, 7 Ch. D. 541 n.; *Pooley v. Bosanquet*, 1877, 7 Ch. D. 541; *Jervis v. Berridge*, 1874, W. N. 195); if the application is made *ex parte*, only an order *nisi* for vacating the registry will be made (*Pooley v. Bosanquet*; *Baxter v. Middleton*, 1898, L. J. N. C. p. 72).

Where an action is improperly registered as a *lis pendens* against a person who is not a party thereto, the Court has jurisdiction to vacate the registration, notwithstanding that the action is being prosecuted *bona fide* as against the defendant (*Schofield v. Solomon*, 1885, 52 L. T. N. S. 679). As to the searches to be made for *lis pendens* on a sale or mortgage, see SEARCHES.

As to when the fact that a suit is pending elsewhere (*lis alibi pendens*) affords any defence to an action brought in this country for the same cause of action, see STAY OF PROCEEDINGS.

**List, Civil.**—At the beginning of each reign a certain annual sum, payable out of the Consolidated Fund (*q.v.*) is settled by Parliament on the Sovereign for the support of his household, and the honour and dignity of the Crown. At one time the amount appropriated to the Sovereign was paid not only for his personal use, but also to defray the expense of the civil service—the whole of those charges being included in a list, called the Civil List, to distinguish it from the statement of the military and naval charges; and although those civil service expenses have long ceased to be paid out of the amount settled on the Sovereign, the term Civil List is still employed to denote the sum thus settled.

By the Civil List Act, 1837, Her Majesty's Civil List was fixed at £385,000, allocated in the manner detailed in the schedule to the Act. In addition to this amount, certain pensions may be annually granted by Her Majesty, and charged on the Civil List; these increase the total amount of the Civil List at the present time to nearly £409,000.

**Literary and Artistic Work.**—See ARTISTIC WORK; BERNE CONVENTION; COPYRIGHT; INDUSTRIAL PROPERTY CONVENTION.

**Literary Institutions.**—See SCIENTIFIC AND LITERARY INSTITUTIONS.

**Literary Property.**—See COPYRIGHT.

**Lithographs.**—See COPYRIGHT.

**Litis æstimatio**—In Roman law, the value of the object in dispute.

**Litis contestatio**—In Roman law, the ceremony which took place between parties to a lawsuit when at the end of the proceedings before the magistrate they called persons to witness that they submitted

the question in dispute to the decision of the *judex* (see Sandars, *Justinian*, 9th ed. Intro. p. lxxi.).

In the Ecclesiastical Courts the *litis contestatio* was the issue in the action (Phillimore, *Ecclesiastical Law*, 2nd ed., 961).

**• Little Damage.**—A railway company in the exercise of its powers under its special Act or the Railways Clauses Act, 1845, is to do “as little damage as can be” (Railways Clauses Act, 1845, s. 16). These words apply not to what is done, but to the manner of doing it—the *modus operandi* (per Lord Campbell, C.J., in *R. v. East and West India Docks*, 1853, 22 L. J. Q. B. 384).

**Liturgy.**—See PRAYER-BOOK.

**Live and Dead Stock.**—In *Porter v. Tournay*, 1797, 3 Ves. 311, Sir R. Arden, M. R., said that the words “live and dead stock” standing alone meant “out-of-door stock,” such as corn, hay, straw, carts, etc. There it was held that under a bequest of “all the furniture and stock of carriages and horses and other live and dead stock,” wine and books did not pass. In *Hutchinson v. Smith*, 1863, 11 W. R. 417, where the bequest was of all the testator’s “furniture, linen, plate, pictures, carriages, horses, and other live and dead stock,” it was held by Sir W. P. Wood, V.C., that books and wines did pass. See also Roper, *Legacies*, 4th ed., p. 275, where it is suggested that the words are synonymous with “property,” and sufficient to pass the whole of a testator’s personal estate.

**Livelihood.**—In *Stephens v. Derry*, 1812, 10 East, 147, it was held that a person claiming to be entitled to be sued only in the London Court of Requests as a person “seeking his livelihood” in London, must seek the whole of his livelihood there. See also *Jenks v. Taylor*, 1836, 5 L. J. Ex. 263.

**Liverpool Court of Passage.**—See PASSAGE, COURT OF.

**Livery (Domestic).**—The clothes supplied by a master for his servant’s use belong to the master, and must be returned to him upon his request or upon the conclusion of the service, unless some agreement to the contrary is made as a term of the hiring or otherwise. Frequently, of course, a supply of clothing, which he is to keep, is part of the servant’s wages. Where a servant was engaged on the terms that he should have a suit of clothes each year, and he was wrongfully dismissed before the end of a year, it was held that he could not maintain trover for that year’s clothes, because they did not become his property till the end of the year (*Crocker v. Molyneux*, 1828, 3 Car. & P. 470).

For the feudal meaning of the term, see Stubbs, *Const. Hist.* 470.

**Liveryman.**—A liveryman, or freeman, of one of the city companies of London is a member of the governing body of the company.



"Time out of mind the place and office of the livery hath been a place and degree of pre-eminence in the said company" (*Taverner's case*, 33 Car. II. Ray. T. 446). In the case cited a mandamus to admit, without unreasonable fine, a person chosen as liveryman was granted.

### **Livery of Seisin.**—See GRANT; SEISIN.

**Livery Stable.**—A livery stable is defined by Webster as "a stable where horses are kept for hire, and where stabling is provided." A livery stable keeper, who is not an innkeeper, has no privilege, and none can be claimed under him; he must therefore rest on his own agreement (*Chapman v. Allen*, H. T. 7 Car. I. Cro. (3) 271; *Yorke v. Greenaugh*, 1701, 2 Raym. (Id.) 867). On the other hand, he is not liable to the inconveniences to which innkeepers are subject, such as taking out licences, etc.; and he is not bound to have soldiers quartered on him (*Parkhurst v. Foster*, 1699, 1 Salk. 387; *Barnard v. How*, 1824, 1 Car. & P. 366). But if a horse in his keeping be lost or stolen he is answerable for it (*Yorke v. Greenaugh*, *ubi supra*; *Francis v. Wyatt*, 1764, 3 Burr. 1498).

A person should satisfy himself of the credit and solvency of the livery stable keeper to whom he proposes to intrust his horse; because horses and carriages standing at livery are distrainable for rent (*Yorke v. Greenaugh*, *ubi supra*). But the case of a horse sent to a livery stable merely to be cleaned and fed is very different from one where he is sent to remain during the owner's pleasure, the feeding and grooming being only incident to the principal object (*Parsons v. Gingell*, 1847, 4 C. B. 558).

A livery stable keeper cannot detain a horse for his keep as an innkeeper may, because he is not bound to take it; much less can he detain or be bound to take a carriage without horses (*Barnard v. How*, 1824, 1 Car. & P. 366; *Parsons v. Gingell*, 1847, 4 C. B. 558). But he may have a lien by special agreement, as where a mare was placed with such a person, who advanced money to her owner, and it was agreed that she should remain as a security for the repayment of the sum advanced, and for the expense of her keep (*Donatty v. Crowder*, 1826, 11 Moo. K. B. 479). If he has such lien by agreement, and the owner of the horse fraudulently takes it out of his possession to defeat the lien, the livery stable keeper may retake it without force, for the lien is not put an end to by his having parted with the possession under such circumstances (*Wallace v. Woodgate*, 1824, 1 Car. & P. 575).

A livery stable keeper has no lien on a horse for money expended upon it at the request of the owner; and this was so held in a case in which a livery stable keeper had employed a veterinary surgeon, at the request of the owner, to blister a horse standing at livery with him for splints, and had actually paid the bill (*Orchard v. Rackstraw*, 1850, 9 C. B. 698).

Where a livery stable keeper brings an action for a horse's keep, money received by him as the price of the horse, but afterwards returned on the rescission of a contract of sale, cannot be set off against him by the defendant as money received for his use, as it ceased to be so when the contract was rescinded; and it makes no difference that the ground of the rescission was fraud, of which the defendant was ignorant (*Murray v. Mann*, 1848, 2 Ex. Rep. 538).

A livery stable keeper who undertakes for reward to receive a horse or

carriage and lodge it in a stable or coach-house, is bound to take reasonable care (*Searle v. Laverick*, 1874, L. R. 9 Q. B. 122). The obligation to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe, and the fact that the building has been erected by the livery stable keeper on his own ground makes no difference to his liability (*ibid.*).

An action against a livery stable keeper for not taking due and proper care of a horse of the plaintiff's, in consequence of which damage has resulted, is founded on contract, and not in tort, and thus differs from an action against a farrier, who shoes a horse negligently, and so commits a breach of a common law duty (*Legge v. Tucker*, 1856, 26 L. J. Ex. 71). See FARRIER.

### **Living, Exchange of.**—See INCUMBENT.

**Living with me.**—A bequest to servants "living with me" does not mean "living in my house," but "living in my service" (*Blackwell v. Pennant*, 1852, 22 L. J. Ch. 155).

**Lloyd's.**—This is a society of underwriters, insurance brokers, merchants, bankers, shipowners, etc., formerly regulated by a deed of association, dated 1811, and now incorporated by special Act (1871, 34 Vict. c. xxi.). The objects of the society are stated in the special Act to be "the carrying on of the business of marine insurance by members of the society; the protection of the interests of members of the society in respect of shipping and cargoes and freight; the collection, publication, and diffusion of intelligence and information with respect to shipping." It derives its name from Lloyd's Coffee-house, which was at first in Lombard Street and then was moved to the Royal Exchange, and from 1688 onwards was a regular resort for persons engaged in maritime commercial business; and its members now carry on business in rooms over the Royal Exchange. They are divided into underwriting, non-underwriting, and subscribing members.

In marine insurance Lloyd's has given its name to the form of policy, which is the common one among private underwriters, has been substantially adopted by insurance companies, and is now embodied in the statutory law (1867, 30 Vict. c. 23, Sched.). The customs of Lloyd's have been allowed to govern policies not framed in accordance with the ordinary Lloyd's policy, e.g. the custom of the underwriter looking only to the broker for the premium, and not to the assured (*Universo I. C. of Milan v. Merchants M. I. C.*, [1897] 1 Q. B. 205; and see BROKER (INSURANCE) and MARINE INSURANCE). Lloyd's underwriters have only a separate and individual liability on policies which they subscribe; thus they may not underwrite a policy (1) in the name of a partnership or otherwise than in the name of one individual (being an underwriting member of the society) for each separate sum subscribed; (2) for the account, benefit, or advantage of any company or association unless they are subscribers to the society or unless every policy underwritten for their account, benefit, or advantage is underwritten in their ordinary place of business (Sched. 4 of special Act).

Underwriting members of Lloyd's have for some years past, as a guarantee, placed in the hands of the committee, either (1) a deposit of £5000 in gilt-edged securities, or (2) a guarantee policy for £5000; but at the present time the committee would probably accept a deposit only, and it is in their discretionary power to require a larger security to be given. The corporation may enforce such a security by suit against a member who fails to meet his engagements as trustees for the persons who have suffered damage thereby, although it has itself suffered no loss (*Lloyd's v. Harper*, 1880, 16 Ch. D. 290).

The chief importance of Lloyd's, however, is that, owing to its agencies situated at all the principal ports of the world, it is the official centre for all shipping intelligence, the agencies sending in daily accounts of all sailings, arrivals, losses, and casualties, and other information which may be of importance to shipping interests generally. Such accounts are posted at Lloyd's in certain books accessible only to members and subscribers, known as Lloyd's Books, and no member or subscriber is allowed to copy any information thence for the benefit of a third party unless with the special leave of the committee. All such intelligence is afterwards printed in Lloyd's Lists, of which an early edition, called the *Morning Sheet*, is published for the use of subscribers only, but which later in the day is incorporated with and published by the *Shipping and Mercantile Gazette*, and so becomes accessible to the public. The secretary's office also furnishes the shipping news to the newspapers.

The commercial importance of Lloyd's is recognised by various statutes. The Committee of Lloyd's (conjointly with those of Lloyd's Register (*q.v.*) and the Institute of London Underwriters) are empowered to select two members of a committee which may be appointed by the Board of Trade to prepare and advise on rules for life-saving appliances (M. S. A. 1894, s. 429, Sched. 17). See LIFE-SAVING APPLIANCES.

Where any ship, British or foreign, is or has been in distress on the coasts of the United Kingdom, and an examination on oath is made into the circumstances, including the name and description of the ship and of the master and owners and goods owners, the ports to and from which the ship was going, the cause of the distress, and the services rendered, a copy of such examination is to be sent to the secretary of Lloyd's (s. 517). So when any wreck exceeding £20 in value in the opinion of the receiver is taken possession of by him, he must send a description of the wreck and any distinguishing marks thereon to the secretary of Lloyd's, who must post it in a conspicuous place (s. 520). Lloyd's have also power to establish signal stations with telegraphic communication in the British Islands, and to acquire sites therefor compulsorily or by agreement (1888, 51 & 52 Vict. c. 29, s. 2, incorporating the Lands Clauses Acts (*q.v.*), subject to conditions as to advertisements and notices, and the consent of the Board of Trade); and to acquire easements by agreement (s. 4); saving the rights of the Admiralty, War Office, Post Office, Government departments, lighthouse authorities, Thames Conservancy, Duchy of Lancaster, Duchy of Cornwall, the Crown (especially in foreshore); and for works near tidal waters the consent of the Board of Trade is necessary, and no right to future accretions is allowed (ss. 12 and 13).

Lloyd's agents have no authority to adjust any loss on behalf of the underwriters (*Drake v. Marryat*, 1823, 1 Barn. & Cress. 473; 25 R. R. 464); but they are proper persons for the master of a ship to consult before selling the ship in a port of distress (*The Bonita*, 1861, Lush. 252).

## LOAD-LINE

**Lloyd's Bond.**—This is an instrument under the seal of a corporation admitting its indebtedness to a person named therein in a sum specified in the bond, and containing a promise by the corporation to that person to repay him that amount on a future day, and interest at a fixed rate. It is so called after the name of the counsel (J. H. Lloyd) who introduced it; and is a security devised for the purpose of enabling corporations like railway companies, whose powers of borrowing money are regulated and limited by statute, to incur greater money liabilities than statute allows them by borrowing. Such an instrument in order to be valid must not be issued otherwise than under the authority of some statute, or it is invalid and entails the forfeiture to the Crown of a sum equal to that for which it purports to be a security (1844, 7 & 8 Vict. c. 85, s. 19). Thus if it be intended merely for the purpose of borrowing money and not for meeting a liability, it will be invalid (*Chambers v. Manchester and Milford Rwy. Co.*, 1864, 5 B. & S. 588); but it will be good if the company which grants it has had the benefit of the money for which the instrument was given (*In re Cork and Youghal Rwy. Co.*, 1869, L. R. 4 Ch. 748).

[*Authorities.*—Ogilvy, *Dictionary*; Stephens, *Commentaries*, ii. 170.]

**Lloyd's Policy.**—See MARINE INSURANCE.

**Lloyd's Register.**—This is an unincorporated society, established in 1843, for the purpose of obtaining a faithful and accurate classification of the shipping of the United Kingdom and of the foreign vessels trading thereto; but it does not trade or carry on business or make any gains or profits. A register book is printed annually by the society for the use of its members, containing the names of vessels alphabetically arranged and ranked in different classes (*e.g.* A 1) according to their construction, nature of materials, state of repair, etc., as determined by surveys made by the society's surveyors. Ships of all descriptions, including yachts, may be registered; and the society issues certificates of the character of the ships surveyed and registered. Even though such survey be negligently made and the ship be wrongly classed by the society's surveyor, and a purchaser gives more money for her than he should have done, he has no right of action against the Committee of Lloyd's Register if he is not a member of the society (*Thiodon v. Tindell*, 1891, 7 Asp. 76, following *Bravington v. Chapman*, 1878, *ibid.*). The committee have a right, conjointly with the Committee of Lloyd's and the London Institute of Underwriters, to select two members for a Board of Trade consultative life-saving appliances committee (see LLOYD'S); and may be appointed by the Board to approve and certify the position of ships' load-lines (see LOAD-LINE).

**Loading.**—See CARGO.

**Load-line.**—The Merchant Shipping Act, 1894, has the following provisions with regard to the load-line of ships:—The owner of every British ship proceeding to sea from a port in the United Kingdom (except coasters (*q.v.*) under 80 tons burden, ships solely employed in fishing, and pleasure yachts) must have her marked on each side amidships with a circular disc 12 inches in diameter, and a horizontal line 18 inches long

drawn through its centre; such disc is to be placed at a level below the deck-line approved by the Board of Trade, and indicates the maximum load-line in salt water to which the ship may be loaded, and its position is decided and may be modified by the Board of Trade (s. 438). A ship which is so loaded as to submerge its load-line is an unsafe ship, and therefore subject to detention, whether British or foreign, if in the latter case she has taken in cargo at a port in the United Kingdom (see *BRITISH SHIP*; *FOREIGN SHIP*; ss. 439, 459-462). In the case of foreign-going vessels (*g.v.*), the load-line must be marked before the vessel is entered outwards, or as soon afterwards as possible. Her owner, upon entering her outwards, must state in the form of entry the distance between the centre of this disc and the upper edge of each deck-line above it, under penalty of the ship being detained; the master of the ship must enter a copy of such statement in the agreement with the crew (see *CREW*) before any of the crew sign it, and until such entry be made, a superintendent must not proceed with the engagement of the crew; and the master must also enter a copy of such statement in the official log-book. A ship which has been so marked must continue so till she next returns to a port of discharge in the United Kingdom (s. 440). In the case of coasting vessels (*g.v.*), the ship must be so marked before the ship proceeds to sea from any port, and the owner must also, once in every twelve months, state in writing, to the chief officer of customs of the ship's port of registry, the distance between the centre of the disc and the upper edge of each deck-line above it. If the disc be renewed or altered, the owner must give written notice of it in the same way before the ship proceeds to sea, with a similar statement to that mentioned above. For any default to make such notice or statement the owner is liable to a penalty of £100; and a vessel so marked must continue so till notice is given of an alteration (s. 441). For failure to so mark or keep marked a British ship, or for loading her beyond the load-line, or concealing, removing, altering, defacing, or obliterating any such marks (or allowing any such act to be done), except by lawful alteration or in order to escape capture by an enemy, a penalty of £100 is imposed, and a similar penalty is recoverable from the owner of any ship which is marked so inaccurately as to be likely to mislead (s. 442); but an owner whose ship is overloaded without his knowledge or assent by her master is not liable under this section (*Massey v. Morris*, [1894] 2 Q. B. 412). The Board of Trade may appoint certain persons to approve and certify on their behalf the position of the load-line, or its alteration, and may make regulations as to the lines or marks to be used, and the mode in which they are to be marked or affixed to the ship, the certificates to that effect, and entry of such certificates and other particulars as to draught of water and freeboard of the ship, in its official log-book: all such regulations are to have statutory force; and such certificates may be substituted for statements to the chief officers of customs above mentioned (s. 443). Where any British Colonial Legislature has made provisions for load-lines equally effective with those of the Act, ships registered in such colony which have complied with such provisions are considered to have complied with the provisions of the Act (s. 444); and the same privilege is granted under the same conditions to foreign ships, when in ports of the United Kingdom, provided that the country to which they belong extends "corresponding privileges to British ships (s. 445). [See Temperley, *Merchant Shipping Act*.]

A foreign ship which has taken on board all or part of her cargo at a port in the United Kingdom, and is, whilst there, unsafe, owing to overload-

ing (or undermanning), may be detained till this defect is remedied, although the provisions of the M. S. A. have not been applied to ships of her country by Order in Council; and if, after detention or notice of detention, and before being released by competent authority, such a ship proceeds to sea, her owner (if privy thereto) or her master is liable to a fine of £100 (*Chalmers v. Scopenich*, [1892] 1 Q. B. 735; M. S. A. 1894, ss. 462, 692, 734; M. S. A. 1897, s. 2).

**Loan.**—All loans made to the Crown or Government are effected under the authority of Parliament, in consequence of the constitutional rule established in the seventeenth century by the Bill of Rights (1 Will. & Mary, sess. 2, c. 2). The same rule had already been laid down by Parliament before the Rebellion (3 Chas. I. c. 1; 16 Chas. I. c. 14), but cannot be said to have been incorporated finally in the constitution until the Revolution.

Borrowing by the State is now effected—

- (1) By TREASURY BILLS, which created a floating debt;
- (2) By issue of stock or funds, which is termed the NATIONAL DEBT.

Authority has also been given to incur liability in respect of purposes not strictly belonging to the National Government (see PUBLIC LOANS), and to lend moneys borrowed by the State as a whole for the aid of particular localities (see PUBLIC WORKS LOANS).

**Loan Commissioner.**—See PUBLIC WORKS LOANS.

**Loan, Local.**—See PUBLIC WORKS LOANS.

**Loan, Public.**—See PUBLIC LOANS.

**Loan Society.**—In 1834 (4 & 5 Will. IV. c. 40) an Act was passed authorising the establishment of loan societies. It was repealed and superseded by the Loan Societies Act, 1840 (3 & 4 Vict. c. 110), which is still in force, subject to certain modifications. It was passed as a temporary Act, but was made perpetual in 1863 (26 & 27 Vict. c. 56).

Any number of persons who form a society for establishing a fund for making loans to the industrial classes, and taking repayment by instalments with interest, must, to obtain the benefit of the Act, have their rules for the management of the society certified, deposited, and enrolled, including the scheme of lending and repayment and the rate of interest (1840, ss. 3, 22, 23, Sched. E).

To obtain certification it is necessary to submit three copies signed by three members, and countersigned by the clerk or secretary to the Chief Registrar of Friendly Societies, who has for the purpose, since 1875, superseded the barrister for certifying savings bank rules (38 & 39 Vict. c. 60, s. 10 (4); 59 & 60 Vict. c. 25, s. 2 (1) (c)). The registrar, if satisfied that the rules are calculated to carry into effect the intentions of the framers, and are in conformity with law, certifies each copy. One copy is retained in the chief registry, one returned to the society, and the third transmitted to the clerk of the council of the county or county borough in which the society is formed, for allowance and confirmation by the council without fee,

for filing with the county records. Until 1888 the rules went to the clerk of the peace for allowance by Quarter Sessions (51 & 52 Vict. c. 41, ss. 3 (xv.), 31). The effect of the Act of 1888 on boroughs which are not county boroughs appears to be that in the case of societies formed in such a borough, whether it has or has not a Court of Quarter Sessions, the rules should be enrolled by the County Council (ss. 35 (1), 36, 38).

When the rules have been certified, and apparently even before enrolment, they bind the members and officers of the society, and borrowers and sureties (1840, s. 4; *Bradburne v. Whitbread*, 1843, 5 Man. & G. 439). They must, after enrolment, be entered in a book open for inspection; and cannot be varied or rescinded except by resolution of a properly convened general meeting (1840, ss. 5, 7), and resubmission to the chief registrar, with an affidavit by an officer of the society that the Act has been complied with (1840, ss. 4, 5).

The fees for certification are one guinea, and in case of amendments a further guinea if three years have elapsed since the last certificate. No fee may be charged for enrolment (1840, ss. 4, 6).

*Status*.—Certification and enrolment have not the effect of incorporation. The society is a partnership, and it vests in trustees appointed by the members; and the trustees represent the society in all legal proceedings other than those on notes or securities given in favour of a named officer (1840, ss. 8, 16–19).

*Debentures*.—Debentures may be issued to secure deposits. The trustees and officers in the absence of express agreement incur no liability thereon. Sums under £50 so secured are payable without taking out administration on the death of the holder. The society may adopt the Forged Transfer Acts (1840, ss. 9–11)). See FORGED TRANSFER, vol. v. p. 457.

*Loans*.—A society may not lend more than £15 to one person at the same time, nor have more than one loan to the same person outstanding. Securities taken for a loan are not transferable or negotiable. Where a note is given it is in favour of the treasurer for the time being (1840, ss. 13, 15, 16, Scheds. A, B).

No stamp duty is imposed on debentures or on notes or securities given for loans (1840, ss. 9, 14), and no fees exceeding 1s. 6d. are chargeable for inquiries as to the status of a would-be borrower; but interest not exceeding 12 per cent. may be taken by way of discount from the amount lent (1840, ss. 20, 21). Instalments must not be paid in advance, nor loans ballotted for (1840, s. 24). When the Act was passed the usury laws were in force, and they appear to continue for the purpose of penalties on officers who make charges not sanctioned by the Act (1840, s. 23).

In case of default, loans may be recovered before a Court of summary jurisdiction for the district where the debtor resides or is, or before a County Court, on the complaint or suit of the treasurer or clerk for the time being (1840, ss. 16–20, Sched. C; *Timms v. Williams*, 1842, 3 Q. B. 413).

*Accounts*.—An abstract of accounts must be made annually and sent to the Chief Registrar of Friendly Societies, who in case of default can recover a penalty of £50 out of the assets of the society, by action against the trustees. The accounts must be laid before Parliament (1840, s. 27; 1890, c. 25, ss. 2, 6).

*Officers*.—Officers in receipt or custody of money or securities must give security for faithful execution of office or trust (1840, s. 12, Sched. D).

*Winding up.*—It would seem that a loan society cannot be wound up under the Companies Act (1862, ss. 199–204) unless it has seven members when proceedings are instituted; but in such a case it can be dealt with as a partnership (*Coop v. Booth*, 1879, 12 Ch. D. 679).

On May 16, 1876, the Treasury, under the powers of the Friendly Societies Act, 1875, specially authorised the registration of societies formed "to create funds by monthly or other subscriptions, to be lent out to, or invested for, the members of a society, or for their benefit, pursuant to the Act" (38 & 39 Vict. c. 60, s. 18; 1896, c. 25, s. 8 (5)).

Notwithstanding this authority, societies are still formed under the Act of 1840 (Parl. Pap. 1897, C. 97, p. 70); and at the end of 1895 there were in existence 341 societies, having 37,711 members, and having circulated during the year £340,922 (Parl. Pap. 1897, C. 97, p. 71).

**Lobster.**—See CRABS AND LOBSTERS.

**Local Act.**—A local Act of Parliament may be described as an Act relating to a subordinate area in a constituent part of the empire, and which is not of general public interest. The classification of Acts into local and private has been substituted for the division into local and personal. Local Acts have their chapters printed in Roman numerals, as 47 & 48 Vict. c. x. The Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33), s. 2, provided that certain Acts might be omitted from the Revised Edition of the Statutes as if they were local and personal Acts. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 39, provides that the expression "Act" is to include a local and a personal Act. Every Act passed after the year 1850 is a public Act, and is to be judicially noticed as such unless the contrary is expressly provided (52 & 53 Vict. c. 63, s. 9). The Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), provides as to costs and the limitation of actions under local and personal Acts.

[*Authorities.*—Hardcastle, *Statute Law*; Clifford, *History of Private Bill Legislation*.]

**Local Actions.**—See VENUE.

**Local Allegiance.**—See ALIEN; ALLEGIANCE; DENIZEN.

**Local Authority.**—See LOCAL GOVERNMENT; PUBLIC HEALTH.

**Local Government.**—Local Government is at once the oldest and the youngest branch of our political system. Township, hundred, and shire date back to the days of King Alfred; but we are scarcely yet familiar with the "Councils" which now govern the modern equivalents of these areas, the parish, the district, and the county. The parish meeting, which is an institution hundreds of years older than either the House of Lords or the House of Commons, has only received in 1894 its full recognition at the hands of Parliament. Yet this parish meeting is the cradle in which



## LOCAL GOVERNMENT

our liberties were nursed. It was the school in which our forefathers learnt those lessons of self-respect, self-help, and self-reliance which have made the English nation what it is. Slowly and gradually they learnt them, but by such lessons alone does a nation rise to a true conception of the meaning of liberty and the methods of self-government.

The free tenants of every manor were bound to do homage and to render personal service to their lord; the copyholders were villeins, tied to the soil; and the manorial courts tended ever to keep the people in subjection. But in the church and in the vestry all were equal, all were free; women, too, took part. The parish meeting was held, first in the church, and later in the vestry; and it was always democratic in its character; it tended ever to elevate the people, and give them life and hope. And over this meeting presided, not the lord or his steward, but the parson or parish priest, not yet dubbed "rector." Then as the hamlet grew into the town, and the parishioner became a burgess, the same spirit created municipal freedom; the guild of each craft was still closely connected with a church; and the men who could manage the business of their guild soon claimed to control the affairs of their borough. The government of the counties, on the other hand, remained essentially aristocratic; the *shire-moot* consisted almost exclusively of landowners, and the sheriff, appointed by the king, presided; the freeholders elected the coroner. Gradually all except the more important landowners became more and more remiss in their attendance at these gatherings; and ultimately the whole management of the affairs of the county fell into the hands of the justices of the peace, who were nominated by the lord lieutenant.

Thus all our local institutions grew up—gradually, spontaneously, and irregularly, as most things do in England. There was no cohesion, no system; but no one wished for either. Each borough had its own customs, which decided who should vote as a freeman, and who should not. The freemen of the borough sent their representatives to Parliament; the forty-shilling freeholders elected knights of the shire; but neither body of electors ever sought to introduce any principle of representation into the government of the counties. The justices, as a rule, managed the county business well; and the county electors, illogically but sensibly, acquiesced in the government of a class.

Then, early in this century, sprang up the zeal of the reformer, and fitful attempts were made to remedy the eccentricities and remove the shortcomings of our local institutions. But in these attempts, too, there was no cohesion, no system, no guiding principle. Everything was done piecemeal. Each special need was dealt with separately. Benevolent persons, who desired to reform the poor laws in the days of William IV., had no knowledge of sanitary science, and had no desire to interfere in the management of bridges and highways. When unions were created in 1834, no regard was paid to the historic division of our island into counties. Nearly one-third of the total number of unions cut county boundaries. Many parishes lay in two counties, or partly in a county and partly in a borough. Moreover, the lands which composed a single parish were often wholly detached and sometimes widely separated. In Yorkshire, as late as 1875, there were more than seventy parishes thus divided, and one parish had no less than ten outlying portions surrounded by the lands of other parishes. And as the nation developed and its requirements increased, new local authorities were created,—Highway Boards; Local Boards of Health; Improvement Act Commissioners; Port Sanitary Authorities; Burial Boards; and School Boards,—a new and special

authority was called into existence to meet each crying need. And in each case this was done without any regard to previously existing divisions or authorities. Each new creation paid no heed to, and seemed to have no knowledge of, any of its predecessors, but appointed its own staff of officers, levied its separate rate, and pursued its own independent policy. The result was that the country was covered with a number of separate authorities,—"a jungle of jurisdictions,"—whose functions sometimes clashed, whose areas intersected. The members of these bodies were elected at different times, for different periods, by different methods of voting; and the qualifications both of the candidates and the electors differed in each case. Each petty board had its own staff of officers maintained at the expense of the ratepayers. There were eighteen different kinds of rates. Time, work, and money were habitually wasted; and the result was extravagance and confusion.

Mr. Chalmers wrote in 1883: "Local government in this country may be fitly described as consisting of a chaos of areas, a chaos of authorities, and a chaos of rates" (*Local Government*, p. 17). But he could not say so now. The Local Government Acts of 1888 and 1894 have changed the face of things. These most important measures are carefully devised, well thought out, and well expressed; they have remedied abuses and simplified the whole machinery. They may not be above criticism in some respects; a further measure of reform may be needed hereafter. But we now have at all events a clear and intelligible system of local government in England.

It is impossible in this short article to take more than the most general view of this system. For further details the reader must refer to the separate articles, which he will find each under its appropriate heading. We can only attempt here to show in outline the result of recent legislation.

1. *The Parish*.—The parish is now once more the unit of local government. The Roman *vill*—if the vill was Roman,—the Saxon *tun* or township, and the Norman manor, have all given place to the parish, which was originally an ecclesiastical division. No doubt the boundaries of the parish, the vill, the township, and the manor often coincided; though generally there were more villis than one in a parish, more parishes than one in a manor. But now the parish is a civil area. There are 14,896 civil parishes in England and Wales.

In all rural parishes the vestry is now, for all practical purposes of civil government, superseded. If a rural parish has a population of over three hundred, it elects a Parish Council; if its population is not over three hundred, its affairs are managed by the Parish Meeting. The Council or the Meeting controls the disposition of parish property, has a voice in the management of all parochial charities, can veto the closure of any public road or footpath, countermand the formation of a School Board, and adopt certain permissive Acts for providing the parish with light, baths, wash-houses, burial grounds, recreation grounds, and public libraries. See further the articles PARISH; PARISH COUNCIL; PARISH MEETING; and VESTRY. Moreover, under the DIVIDED PARISHES ACTS (*q.v.*) parish boundaries have been largely rectified; many large parishes have been divided; all detached portions of one parish which were wholly surrounded by another have merged in the latter parish. And now, so far as practicable, the whole of every parish is in the same county and within the same district, urban or rural, of that county (L. G. Act, 1894, ss. 1 (3) and 36 (2)).

2. *The Borough*.—There are now three hundred and six boroughs in

England and Wales. Eighteen of these have by ancient custom all the organisation of a county, and are called "The County of the City of —," or "The County of the Town of —." By the L. G. Act of 1889 a new class of boroughs was created, called "County Boroughs." There are sixty-four of these. Other boroughs have a separate Court of Quarter Sessions, presided over by a recorder; many others have a separate commission of the peace. See further BOROUGH and BOROUGH FUND, vol. ii. pp. 213, 217; and LONDON.

3. *The District*.—This is the modern substitute for that ancient division of a county—the *Hundred* or *Wapentake*—which is now obsolete. The head officer of the hundred was the high constable; but none have been appointed since 1869 (32 & 33 Vict. c. 47). All other constables of a hundred had been abolished, or rather merged in the county police, by the County Police Act, 1856 (19 & 20 Vict. c. 69). The criminal jurisdiction of the Hundred Court was transferred to the county justices sitting in their petty sessional divisions. One relic still lingered till quite recent times. If a riot broke out and any man's house or property was injured by the mob, he could claim compensation from the inhabitants of the hundred in which the house or property was situated. But even this last trace has now disappeared; such a claim must now be made against the police authority of the district (49 & 50 Vict. c. 38); and the hundred exists only on the county map.

• Its place is taken by the district. There are now fifteen hundred and twenty-six districts in England and Wales, of which seven hundred and eighty-six are Urban Districts, six hundred and eighty are Rural Districts, and sixty are Port Sanitary Districts. Under the L. G. Act of 1894, every Urban and Rural District has its District Council, which is the sole sanitary authority, and generally the sole highway and burial authority in the district. All Burial Boards, Highway Boards, and Surveyors of Highways have practically ceased to exist; and so have all Improvement Commissioners, except in connection with harbours. See DISTRICT COUNCIL, vol. iv. p. 312; HIGHWAY AUTHORITY, vol. vi. p. 180; and PORT SANITARY AUTHORITY."

4. *The Union*.—A union is a statutory group of parishes, united for poor law purposes under the Poor Law Amendment Act, 1834 (4 & 5 Will. iv. c. 76); though a single parish if sufficiently populous may be a union. In such union there may be a Board of Guardians which administers the poor law. With the possible exception of two co-opted or additional members, all guardians are now elected by the parishes; each constituent parish which has a population of not less than three hundred sends at least one member. In an urban district the District Council and the Board of Guardians are elected separately, and may consist of entirely different persons. But it is otherwise in rural districts. Guardians, as such, are no longer elected for any rural parish; but the persons who are elected members of the rural District Council are also necessarily poor law guardians. They represent each his own parish on the Board of Guardians for the union, without any separate election; and this, although the rural District Council and the Board of Guardians are entirely distinct bodies.

Some complaint has been raised as to this. It is urged that the work of a district councillor is different from that of a poor law guardian, and requires somewhat different qualifications. Why then must the same man be both? A good councillor, it is said, may be an inefficient guardian, or *vice versa*: an efficient man may not have leisure to serve properly in both capacities. The answer is, that it has been found by experience that if the

duties of any such post are increased, superior men will seek election to it; but that capable men will not come forward as candidates for an office in which their powers are limited, and their opportunities of usefulness are scanty.

5. *The School Board District* may be a borough or a parish, or portion of a parish, or a group of small parishes united for educational purposes by order of the Education Department. The electors are in a borough the burgesses; in a parish the ratepayers. A School Board must be elected in every district in which the public elementary school accommodation has been found insufficient. Where the accommodation is sufficient, the electors may still have a School Board, if they wish; but if this be not desired, a School Attendance Committee must be appointed to enforce the law. This committee is in a borough appointed by the town council; elsewhere by the Board of Guardians, or in a few cases by the urban District Council. Schools for pauper children, other than workhouse schools, may be provided by combinations of unions or of parishes not in any one union. Such combinations are formed by order of the Local Government Board, but with the consent of the majority of guardians in each union or parish.

6. *The Petty Sessional Division*.—For purposes of the criminal law every county is also divided into petty sessional divisions. The justices resident in each such division meet every month, or oftener, at some market town which is conveniently central, to dispose of petty cases, and send more serious offences for trial at Quarter Sessions or the Assizes. A division of this kind is generally of about the same area as a union. The justices in Quarter Sessions have power under 9 Geo. IV. c. 43 to rearrange and adjust the boundaries of these divisions; and in some counties they are already trying to make the petty sessional divisions coincide, so far as possible, with the unions. It is illogical and inconvenient that a county should for different purposes be cut up into *four* distinct series of areas. If it could be arranged that the same area should be always both a union and a petty sessional division, and should contain two or more subdivisions, each of which should be the district for both a Council and a School Board, a further step of some importance would have been taken in the direction of simplifying and facilitating the government of our counties.

7. *The County*.—There are now sixty-one administrative counties in England and Wales. Each elects its County Council, which possesses and discharges all the administrative powers and duties which formerly belonged to justices in Quarter Sessions. But no judicial functions were transferred to the County Council (L. G. Act, 1888, s. 78, subs. 2). The county police are managed by a joint committee of the County Council and the justices. The freeholders no longer elect the coroner; this duty or privilege is also transferred to the County Council; and with it disappears the last relic of the old *shire-moot* or county gathering. The numerous duties of a County Council are detailed in vol. iii. at p. 525, *sub nom.* COUNTY COUNCIL. See also articles COUNTY, COUNTY PROPERTY, and COUNTY RATE. The tendency now is to give more and more work to the County Council, and to place it to some extent in command over the District and Parish Councils within its borders. The County Council is to see that the lesser authorities do the work prescribed for them: it settles their boundaries and their disputes, and generally supervises the work of local government over the whole county.

8. *Central Control*.—But while Englishmen thus adhere to the principle of local self-government, which had a large share in developing their national

character and securing them the liberties which they possess, still it is necessary that there should be a central authority—not to do the work or to take the responsibility which belongs to the local executive—but to keep it everywhere in action; to develop and strengthen it; to give advice, when asked; to volunteer it, where it seems to be required; and in some cases even to compel the local authority to do its duty. The independence of the local administrative councils is not diminished, but rather invigorated by the existence of an efficient central body, which can guide and superintend their various activities, and aid them with higher and wider knowledge than is available in the district.

Prior to 1871 such central supervision as existed was divided among various departments of State, which had no organised or necessary communication with each other. There was a Local Government Act Department of the Home Office, to which many general questions of local government were referred; the Privy Council dealt with measures for the prevention of disease; other matters came before the Board of Trade. There was no sufficient staff of inspectors or other officers; no concentration; no constant and official communication between central and local officers throughout the kingdom. A Royal Sanitary Commission was appointed in 1869, which strongly deprecated the existing inefficiency and uncertainty of the central sanitary authority, and urged the necessity of a new statute to "constitute and give adequate strength to one central authority." The Commissioners say in this Report: "There should be one recognised and sufficiently powerful minister, not to centralise administration, but, on the contrary, to set local life in motion—a real motive power, and an authority to be referred to for guidance and assistance by all the sanitary authorities for local government throughout the country. Great is the *vis inertiae* to be overcome; the repugnance to self-taxation; the practical distrust of science; and the number of persons interested in offending against sanitary laws, even amongst those who must constitute chiefly the local authorities to enforce them." The recommendations contained in this report were carried into effect by the Act of 1871 (34 & 35 Vict. c. 70), which created the LOCAL GOVERNMENT BOARD. (See the next article.)

Similarly, in 1889 another central department, called the Board of Agriculture, was created by the Statute 52 & 53 Vict. c. 30, and to this body were transferred all the powers and duties of the Land Commissioners and the former Tithe, Copyhold, and Inclosure Commissioners, and also all the powers and duties of the Privy Council under the Acts relating to Destructive Insects and the Diseases of Animals. To these have been added by subsequent legislation the superintendence of the Ordnance Survey of Great Britain, Ireland, and the Isle of Man, the duties of the Board of Trade under the Corn Returns Act, 1882, and many other miscellaneous duties. (See BOARD OF AGRICULTURE, vol. ii. pp. 183–187.) Licences to local authorities under the Electric Lighting Acts, 1882 and 1892, are still granted by the Board of Trade, which also regulates Light Railways. (See BOARD OF TRADE, vol. ii. p. 188, and the Light Railways Act, 1896, 59 & 60 Vict. c. 48.) School Boards and School Attendance Committees, as regards all matters relating to education, are still under the control of the Education Department of the Privy Council. And the sanction of the Treasury is still required for loans for certain local purposes. But substantially the general superintendence and control of local government is now in the hands of the Local Government Board.

## Local Government Board.

## TABLE OF CONTENTS.

I. THE CONSTITUTION OF THE BOARD	503	IV. ADMINISTRATIVE CONTROL	510
Poor Law Board . . . . .	503	Pollution of Streams . . . . .	510
II. GROWTH OF THE FUNCTIONS OF THE BOARD . . . . .	504	Adulteration . . . . .	511
• Poor Law Acts . . . . .	504	Vaccination . . . . .	512
• Public Health Acts . . . . .	505	Miscellaneous Duties . . . . .	512
• Miscellaneous Statutes . . . . .	506	V. FINANCIAL CONTROL	512
III. LEGISLATIVE POWERS . . . . .	507	Loans . . . . .	512
Rules, Regulations, and Orders . . . . .	507	Audit . . . . .	513
Confirmation of By-Laws . . . . .	509	VI. ADVICE . . . . .	513
		VII. RETURNS . . . . .	514

## I. THE CONSTITUTION OF THE BOARD.

This department of State was created in 1871 by the Local Government Board Act (34 & 35 Vict. c. 70). The object of this important measure is, according to its preamble, "to concentrate in one department of the Government the supervision of the laws relating to public health, the relief of the poor, and local government." The Act then proceeds to constitute a new body under the name of "The Local Government Board," with a President, who is appointed by Her Majesty, and holds office during the pleasure of Her Majesty, and who is authorised to do all acts and execute all instruments in the name and on behalf of the Board, which the Board itself could do or execute. The President of the Local Government Board may sit in Parliament; he is almost invariably a member of the Cabinet; he is paid a salary of £2000 a year. There are also certain unpaid *ex officio* members—the Lord President of the Council, all the Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer. But these gentlemen in fact take no share in the work of the department, which is done by the President and the permanent staff. The Permanent Secretary is Sir Hugh Owen, K.C.B. There are four assistant secretaries. The Chief Medical Officer is Sir R. T. Thorne, K.C.B., M.B. The offices of the Board are at Whitehall, S.W.

The Local Government Board Act of 1871 vested in the new Board (1) all the powers and duties of the Poor Law Board; (2) all the powers and duties of the Privy Council relating to vaccination and the prevention of disease; (3) all the powers and duties of the Home Office in relation to public health, drainage, and sanitary matters, baths and washhouses, public and town improvements, artisans' and labourers' dwellings, local government, local returns, and local taxation.

What, then, were the powers and duties of the Poor Law Board?

*Poor Law Board.*—By the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76; a most important measure, which is the basis of our modern poor law), the Crown was allowed to appoint, and did appoint, for a period of five years three commissioners, who were styled "The Poor Law Commissioners for England and Wales." To these gentlemen was intrusted the duty of carrying the Act into execution, with the aid of assistant commissioners and other officers. The administration of relief to the poor throughout England and Wales, according to the existing laws, was made subject to the direction and control of these Commissioners, who were authorised and required to make and issue all such rules, orders, and regulations for the management of the poor, for the government of work-houses, and the education of children therein, and for the apprenticing of poor children, and for the guidance and control of all guardians, vestries, and parish officers, so far as related to the management of the poor, and

the keeping, examining, auditing, and allowing or disallowing of accounts, and making and entering into contracts, or any expenditure for the relief of the poor, and for carrying the Act into execution in all other respects, as they should think proper. All the powers of Gilbert's Act (22 Geo. III. c. 83), of the 59 Geo. III. c. 12, and of all other Acts, general as well as local, relating to the providing of workhouses, the borrowing of money, and governing and employing the poor, were made subject to the control of the Commissioners. But no power was given them to interfere in any individual case for the purpose of ordering relief.

In 1839 the Poor Law Commissioners were continued in office for a year. This was repeated till 1842, when they were continued for a further period of five years by the Statute 5 & 6 Vict. c. 57. In 1847 a new body of Commissioners was appointed by the Statute 10 & 11 Vict. c. 109, to which (by the 12 & 13 Vict. c. 103, s. 21) the name of "The Poor Law Board" was given. And on this new body was conferred the power of appointing paid inspectors to assist in the execution of the various Acts for the relief of the poor. These Commissioners, like their predecessors, were originally appointed only for five years; but their powers were from time to time continued; and eventually the Poor Law Board was established as a permanent body by the Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 1. The Act of 1847 (10 & 11 Vict. c. 109) received the Queen's assent on July 23, 1847; and on the very next day (July 24) the newly appointed Commissioners issued a "General Consolidated Order," which codified all pre-existing rules and orders, and which still is constantly referred to as regulating the practice in all poor law matters.

## II. GROWTH OF THE FUNCTIONS OF THE BOARD.

In the meantime the Legislature had not been idle. Nearly every year fresh powers and duties were conferred on the Poor Law Commissioners, and subsequently on the Poor Law Board. In this brief article it is only possible to set out the titles of the various Acts for reference:—

5 & 6 Will. IV. c. 69, ss. 1, 3, 6.	Union and Parish Property Act, 1835.
6 & 7 Will. IV. c. 96, s. 3.	Parochial Assessments Act, 1836.
7 Will. IV. & 1 Vict. c. 50, ss. 1, 2, 3, 4.	Conveyance of Copyholds for Workhouse Sites Act, 1837.
1 & 2 Vict. c. 25, s. 2.	Liquidation of Loans for Building Workhouses Act, 1837.
4 & 5 Vict. c. 38, s. 6.	Education (School Sites) Act, 1841.
5 & 6 Vict. c. 18, ss. 1, 3.	Parish Property and Debts Act, 1842.
5 & 6 Vict. c. 57, ss. 2, 4, 7, 8, 11.	Poor Law Amendment Act, 1842.
7 & 8 Vict. c. 101, ss. 12, 15, 30, 32, 36, 40-44, 48, 49, 51, 53, 59, 61, 62.	Poor Law Amendment Act, 1844.
10 & 11 Vict. c. 109, ss. 2, 19, 20, 21, 22, 24, 25.	Poor Law Board Act, 1847.
11 & 12 Vict. c. 82, s. 4.	Districts for Education Act, 1848.
11 & 12 Vict. c. 91, ss. 1, 2, 4, 5, 10, 11.	Poor Law Audit Act, 1848.
11 & 12 Vict. c. 110, s. 5.	Poor Law Amendment Act, 1848.
12 Vict. c. 13, ss. 1, 3-7.	Boarding-out Act, 1849.
12 & 13 Vict. c. 103, ss. 11, 12, 14, 20.	Poor Law Amendment Act, 1849.
13 & 14 Vict. c. 57, ss. 1, 4-8.	Vestry Act, 1850.
13 & 14 Vict. c. 101, ss. 2, 3, 6.	Poor Law Amendment Act, 1850.
14 & 15 Vict. c. 105, ss. 4, 6, 12, 14, 15, 17.	Poor Law Amendment Act, 1851.
15 & 16 Vict. c. 85, s. 29.	Burial Act, 1852.
16 & 17 Vict. c. 96, s. 28.	Lunacy Act, 1853.

- 16 & 17 Vict. c. 97, s. 64.  
 17 & 18 Vict. c. 104, s. 141.  
 18 & 19 Vict. c. 79, s. 2.  
 20 & 21 Vict. c. 81, s. 6.  
 22 & 23 Vict. c. 49, ss. 1, 3, 5.  
 24 & 25 Vict. c. 125, s. 1.  
 25 & 26 Vict. c. 43, ss. 1-4.  
 27 & 28 Vict. c. 42, s. 1.  
 27 & 28 Vict. c. 116, ss. 1, 4, 5.  
 28 & 29 Vict. c. 79, s. 14.  
 29 & 30 Vict. c. 113, ss. 7, 14.  
 30 Vict. c. 6, *passim*.  
 30 & 31 Vict. c. 106, ss. 2, 3, 13, 15, 20.  
 31 & 32 Vict. c. 122, *passim*.  
 32 & 33 Vict. c. 45, ss. 4, 5.  
 32 & 33 Vict. c. 63.  
 32 & 33 Vict. c. 67.  
 33 Vict. c. 2, ss. 1, 2, 4, 7, 8, 11.  
 33 & 34 Vict. c. 18, s. 1.  
 33 & 34 Vict. c. 48, s. 1.  
 33 & 34 Vict. c. 94, ss. 1, 2.  
 34 Vict. c. 11, ss. 1, 2.  
 34 Vict. c. 15, s. 1.  
 Lunatic Asylums Act, 1853.  
 Merchant Shipping Act, 1854.  
 Burial of Paupers Act, 1855.  
 Burial Act, 1857.  
 Union Debts Act, 1859.  
 Parochial Offices Act, 1861.  
 Education of Pauper Children Act, 1862.  
 Union and Parish Officers Superannuation Act, 1864.  
 Metropolitan Houseless Poor Act, 1864.  
 Union Chargeability Act, 1865.  
 Poor Law Amendment Act, 1866.  
 Metropolitan Poor Act, 1867.  
 Poor Law Amendment Act, 1867.  
 Poor Law Amendment Act, 1868.  
 Union Loans Act, 1869.  
 Metropolitan Poor Amendment Act, 1869.  
 Valuation (Metropolis) Act, 1869.  
 Dissolved Boards of Management and Guardians Act, 1870.  
 Metropolitan Poor Amendment Act, 1870.  
 Paupers Conveyance Expenses Act, 1870.  
 Medical Officers Superannuation Act, 1870.  
 Poor Law Loans Act, 1871.  
 Temporary Asylums (Metropolis) Act, 1871.

And from the moment that the Local Government Board was constituted in 1871, the same process continued. Nearly every year some new power is conferred, or some new duty is imposed, or some amendment is made in the procedure of the Board. To a large extent this legislation is suggested by the able assistant secretaries of the Board, who know better than anyone else where the machinery does not work quite smoothly, and proceed at once to repair the defects. But it is high time that all these minute provisions which are scattered broadcast over the Statute Book should be collected into one "Local Government Code." Thus, in Poor Law matters alone, the following Acts affecting the Local Government Board have been passed since the Act which created the Board:—

- 34 & 35 Vict. c. 108.  
 35 Vict. c. 2.  
 36 Vict. c. 9.  
 36 Vict. c. 19.  
 39 & 40 Vict. c. 61.  
 42 Vict. c. 6.  
 42 & 43 Vict. c. 54.  
 45 & 46 Vict. c. 58.  
 46 Vict. c. 11.  
 47 & 48 Vict. c. 5.  
 52 & 53 Vict. c. 56.  
 57 & 58 Vict. c. 25.  
 57 & 58 Vict. c. 53.  
 59 & 60 Vict. c. 50.  
 60 & 61 Vict. c. 28.  
 60 & 61 Vict. c. 29.  
 Pauper Inmates Discharge and Regulation Act, 1871.  
 Poor Law Loans Act, 1872.  
 Bastardy Law Amendment Act, 1873.  
 Poor Allotments Management Act, 1873.  
 Divided Parishes and Poor Law Amendment Act, 1876.  
 District Auditors Act, 1879.  
 Poor Law Act, 1879.  
 Divided Parishes and Poor Law Amendment Act, 1882.  
 Poor Law Conferences Act, 1883.  
 Valuation (Metropolis) Amendment Act, 1884.  
 Poor Law Act, 1889.  
 Outdoor Relief (Friendly Societies) Act, 1894.  
 Equalisation of Rates (London) Act, 1894.  
 Poor Law Officers Superannuation Act, 1896.  
 Poor Law Officers Superannuation Act Amendment Act, 1897.  
 Poor Law Act, 1897.

In matters relating to Public Health, the following may be mentioned:—

- 35 & 36 Vict. c. 79.  
 37 & 38 Vict. c. 67.  
 Public Health Act, 1872.  
 Slaughter Houses, etc. (Metropolis), Act, 1874.



37 & 38 Vict. c. 89.  
 38 & 39 Vict. c. 55.  
 41 & 42 Vict. c. 25.  
 42 & 43 Vict. c. 31.  
 45 & 46 Vict. c. 23.  
 46 & 47 Vict. c. 37.  
 46 & 47 Vict. c. 59.  
 47 Vict. c. 12.  
 48 & 49 Vict. c. 22.  
  
 48 & 49 Vict. c. 35.  
 52 & 53 Vict. c. 72.  
 52 & 53 Vict. c. 94.  
 53 & 54 Vict. c. 34.  
 53 & 54 Vict. c. 59.  
 54 & 55 Vict. c. 76.  
 56 & 57 Vict. c. 47.  
  
 56 & 57 Vict. c. 68.  
 59 & 60 Vict. c. 19.

Sanitary Law Amendment Act, 1874.  
 Public Health Act, 1875.  
 Public Health (Water) Act, 1878.  
 Public Health (Interments) Act, 1879.  
 Public Health (Fruit Pickers Lodgings) Act, 1882.  
 Support of Sewers Act, 1883.  
 Epidemic and other Diseases Prevention Act, 1883.  
 Public Health (Confirmation of By-Laws) Act, 1894.  
 Public Health and Local Government Conferences Act, 1885.  
 Public Health (Ships, etc.) Act, 1885.  
 Infectious Diseases (Notification) Act, 1889.  
 Public Health Act, 1889.  
 Infectious Disease (Prevention) Act, 1890.  
 Public Health Acts Amendment Act, 1890.  
 Public Health (London), Act, 1891.  
 Public Health (London) Act, 1891, Amendment Act, 1893.  
 Isolation Hospitals Act, 1893.  
 Public Health (Quarantine) Act, 1896.

In the wider field of general Local Government, the amount of recent legislation is positively bewildering; as will be seen by the following list:—

34 & 35 Vict. c. 71.

Public Libraries Act, 1855, Amendment Act, 1871.

34 & 35 Vict. c. 98.

Vaccination Act, 1871.

54 & 35 Vict. c. 113.

Metropolis Water Act, 1871.

35 & 36 Vict. c. 61.

Factories (Steam Whistles) Act, 1872.

35 & 36 Vict. c. 91.

Municipal Corporations (Borough Funds) Act, 1872.

36 & 37 Vict. c. 86.

Elementary Education Act, 1873.

36 & 37 Vict. c. 89.

Gas and Water Works Facilities Act, 1870, Amendment Act, 1873.

37 & 38 Vict. c. 75.

Vaccination Act, 1874.

37 & 38 Vict. c. 88.

Births and Deaths Registration Act, 1874.

38 & 39 Vict. c. 36.

Artisans and Labourers Dwellings Improvement Act, 1875.

38 & 39 Vict. c. 63.

Sale of Food and Drugs Act, 1875.

38 & 39 Vict. c. 83.

Local Loans Act, 1875.

38 & 39 Vict. c. 89.

Public Works Loans Act, 1875.

39 & 40 Vict. c. 31.

Public Works Loans (Money) Act, 1876.

39 & 40 Vict. c. 62.

Sale of Exhausted Parish Lands Act, 1876.

39 & 40 Vict. c. 75.

Rivers Pollution Prevention Act, 1876.

39 & 40 Vict. c. 79.

Elementary Education Act, 1876.

40 & 41 Vict. c. 54.

Public Libraries Amendment Act, 1877.

40 & 41 Vict. c. 60.

Canal Boats Act, 1877.

40 & 41 Vict. c. 66.

Local Taxation Returns Act, 1877.

41 Vict. c. 14.

Baths and Washhouses Act, 1878.

41 Vict. c. 18.

Public Works Loans Act, 1878.

41 & 42 Vict. c. 74.

Contagious Diseases (Animals) Act, 1878.

41 & 42 Vict. c. 77.

Highways and Locomotives (Amendment) Act, 1878.

42 & 43 Vict. c. 30.

Sale of Food and Drugs Act Amendment Act, 1879.

42 & 43 Vict. c. 39.

Highway Accounts Returns Act, 1879.

42 & 43 Vict. c. 48.

Elementary Education (Industrial Schools) Act, 1879.

42 & 43 Vict. c. 63.

Artisans and Labourers Dwellings Improvement Act, 1879.

42 & 43 Vict. c. 64.

Artisans and Labourers Dwellings Act, 1868, Amendment Act, 1879.

42 & 43 Vict. c. 77.

Public Works Loans Act, 1879.

43 & 44 Vict. c. 7.

Union Assessment Act, 1880.

44 & 45 Vict. c. 37.

Alkali, etc., Works Regulation Act, 1881.

44 & 45 Vict. c. 38.

Public Works Loans Act, 1881.

45 & 46 Vict. c. 27.

Highway Rate Assessment and Expenditure Act, 1882.

45 & 46 Vict. c. 30.	Baths and Washhouses Act, 1882.
45 & 46 Vict. c. 50.	Municipal Corporations Act, 1882.
45 & 46 Vict. c. 54.	Artisans Dwellings Act, 1882.
45 & 46 Vict. c. 56.	Electric Lighting Act, 1882.
45 & 46 Vict. c. 62.	Public Works Loans Act, 1882.
46 & 47 Vict. c. 18.	Municipal Corporations Act, 1883.
46 & 47 Vict. c. 42.	Public Works Loans Act, 1883.
47 & 48 Vict. c. 37.	Public Libraries Act, 1884.
47 & 48 Vict. c. 75.	Canal Boats Act, 1884.
48 & 49 Vict. c. 72.	Housing of the Working Classes Act, 1885.
50 & 51 Vict. c. 29.	Margarine Act, 1887.
50 & 51 Vict. c. 61.	Local Government (Boundaries) Act, 1887.
50 & 51 Vict. c. 72.	Local Authorities (Expenses) Act, 1887.
51 & 52 Vict. c. 10.	County Electors Act, 1888.
51 & 52 Vict. c. 41.	Local Government Act, 1888.
53 Vict. c. 5.	Lunacy Act, 1890.
53 & 54 Vict. c. 45.	Police Act, 1890.
53 & 54 Vict. c. 70.	Housing of the Working Classes Act, 1891.
55 & 56 Vict. c. 30.	Alkali, etc., Works Regulation Act, 1892.
55 & 56 Vict. c. 57.	Private Street Works Act, 1892.
56 Vict. c. 11.	Public Libraries (Amendment) Act, 1893.
56 & 57 Vict. c. 68.	Isolation Hospitals Act, 1893.
56 & 57 Vict. c. 73.	Local Government Act, 1894.
59 & 60 Vict. c. 9.	Local Government (Determination of Differences) Act, 1896.
59 & 60 Vict. c. 16.	Agricultural Rates Act, 1896.
59 & 60 Vict. c. 36.	Locomotives on Highways Act, 1896.
59 & 60 Vict. c. 59.	Baths and Washhouses Act, 1896.
60 & 61 Vict. c. 40.	Local Government (Joint Committees) Act, 1897.
60 & 61 Vict. c. 51.	Public Works Loans Act, 1897.
60 & 61 Vict. c. 57.	Infant Life Protection Act, 1897.

These lists (which probably are not exhaustive) will convey to the mind of the reader some idea of the infinite variety and complexity of the work of the Local Government Board. It is impossible in this sketch to further pursue details. But the functions of the Board may be roughly grouped under five heads—

Legislative Powers.  
 Administrative Control.  
 Financial Control.  
 Advice.  
 Returns.

### III. LEGISLATIVE POWERS.

*Rules, Regulations, and Orders.*—Parliament has delegated to the L. G. B. a very extensive power of issuing orders and making rules and regulations, which have practically the force and effect of a statute. Thus in poor law matters, the L. G. B. may make rules, orders, and regulations for the management of the poor; for the government of workhouses, and the education of the children therein; for apprenticing children of poor persons; for the guidance and control of guardians, vestries, and parish officers, so far as relates to the management or relief of the poor; for the keeping, examining, auditing, and allowing of accounts, and making and entering into contracts, in all matters relating to such management or relief, or to any expenditure for the relief of the poor; and for carrying the Act into execution. It may, in its discretion, from time to time suspend, alter, or rescind such rules, etc., or any of them. Such rules may affect one union only or several; if it affects more than one union, it is "a general rule" (10 & 11 Vict. c. 109, s. 15). But the Board has no power to interfere in any individual case for the purpose of ordering relief (4 & 5 Will. IV. c. 76, s. 15; 10 & 11 Vict. c. 109;

34 & 35 Vict. c. 70). The L. G. B. may also make rules, orders, etc., for the government of workhouses, the preservation of good order therein, and the nature and amount of the relief to be given to, and the labour to be extracted from, the persons relieved; and may suspend, alter, or rescind the same from time to time (4 & 5 Will. IV. c. 76, ss. 26, 42). The Board may also make rules, etc., as to the emigration of paupers (s. 62; and see 11 & 12 Vict. c. 110).

The L. G. B. is also required by the Statute 12 & 13 Vict. c. 103, as it shall see occasion, to make and issue, as in the case of a workhouse, rules, orders, and regulations for the management and government of any house or establishment, not being a workhouse, in which poor persons shall be lodged, boarded, or maintained, for hire or remuneration, under contract with guardians, overseers, or other persons, or for the education of poor children therein (s. 1). These rules, etc., may be directed to any person being or acting as the proprietor, manager, or superintendent, or as an officer or assistant of such house or establishment, and will come into operation at the date specified by the L. G. B. therein (s. 3). The Board may prohibit, by order, the reception or retention of any poor person or class of poor persons in any such house or establishment (s. 4). It may issue orders regulating the mode in which any contract shall be entered into for lodging and maintenance of poor persons in such houses and establishments, or the terms or duration of such contract, and in the event of non-compliance therewith may declare the contract void (s. 6). It may issue regulations as to the construction and position of the lights which must be exhibited on a motor car after dark (59 & 60 Vict. c. 36, s. 2).

The Board has also made many most valuable regulations under the Canal Boats Acts, 1877 and 1884, with the object of securing that on canal boats which are used as dwellings, adequate accommodation is provided for the persons living in them, and that due attention is paid to sanitation. Provision is also made for the inspection of the boats, and for the education of the children on board. See CANAL, vol. ii. p. 348.

The L. G. B. has also power to make regulations and to issue directions under the Diseases Prevention Acts, 1855 to 1873, with respect to the powers and duties of managers in the Metropolitan Asylum District (46 & 47 Vict. c. 35, s. 10).

The principal General Orders made under the above powers are—

The General Consolidated Order of July 24, 1847, referred to *ante*, p. 504. It relates to meetings of guardians, apprenticeship of pauper children, the management of workhouses, the appointment and duties of officers, etc.

The Out-Door Relief Regulation Order, 1852.

The Boarding-out of Children Orders, 1870 and 1889.

The Relief of Casual Paupers General Order, 1871.

The Canal Boats Regulations, 1877, 1879, and 1887.

The Election of Guardians Orders, 1877, 1881, 1889, and 1890.

The Medical Officers and Inspectors of Nuisances General Order, 1880.

The Conveyance of Paupers Order, 1880.

The Conferences of Guardians General Order, 1883.

The Infectious Diseases Order, 1889.

The District Auditors' Financial Statement Orders, 1890 and 1892.

The Light Locomotives on Highways Order, 1896.

The Port Sanitary Authorities' Accounts Order, 1896.

The legislative power of the Board in poor law matters is, however, subject to a threefold control. In the first place, a copy of every general

rule, order, or regulation issued by it must be laid before both Houses of Parliament "as soon as practicable after its publication" (31 & 32 Vict. c. 122, s. 1). Secondly, the Queen may, by the advice of her Privy Council, disallow any such general rule, or any part thereof, which shall then cease to be of any further force or validity (10 & 11 Vict. c. 109, s. 17). Lastly, there is a power, little known and seldom, if ever, exercised, to bring any order, rule, or regulation of the L. G. B. before a Court of law and have it declared illegal or *ultra vires*. No rule, order, or regulation of the L. G. B. comes into operation until fourteen days after it has, if a general order, been published in the *London Gazette* (35 & 36 Vict. c. 79, s. 48), or, if a single order, sent to the overseers of the parish and the guardians of the union concerned (4 & 5 Will. iv. c. 76, s. 18); though it may be acted on within the fourteen days (12 & 13 Vict. c. 103, s. 12). But at any time within a year after such rule, order, or regulation has been so published (12 & 13 Vict. c. 103, s. 13) any person aggrieved may apply to the High Court of Justice to have the same removed by *certiorari* into the High Court, with a view to its being quashed. Till it is quashed, however, the rule remains in force, in spite of the application (4 & 5 Will. iv. c. 76, s. 105). Notice must be left at the office of the Board at least ten days before the application for the writ of *certiorari* is made, and the Board may show cause against the application in the first instance (s. 106). The persons applying for the writ must give security for the costs of the Board, in case the rule is upheld (s. 107). But if the rule is declared illegal or *ultra vires*, the L. G. B. must at once give notice to all unions, parishes, or places affected (s. 108).

*Confirmation of By-Laws.*—In addition to their own powers of direct legislation, the L. G. B. also performs the important duty of revising and amending by-laws made by subordinate authorities. All by-laws made by any local authority under the Public Health Act, 1875, must be submitted to the L. G. B., which supervises and may alter or disallow them, wholly or in part.

The following are the matters with regard to which by-laws made by sanitary authorities must be confirmed by the Board under the Public Health Act, 1875, as amended by the Public Health (Confirmation of By-laws) Act, 1884 (47 Vict. c. 12):—

Cleansing of footways and pavements.

Removal of house refuse.

Cleansing of earthclosets, privies, ashpits, and cesspools.

Prevention of nuisances.

Keeping of animals.

Common lodging-houses.

New streets and buildings.

Markets.

Slaughter-houses.

Hackney carriages.

Public bathing.

Pleasure grounds.

Horses, ponies, mules, or asses standing for hire.

Pleasure boats and vessels.

Houses let in lodgings.

Cemeteries.

Mortuaries.

Offensive trades.

Hop-pickers.

The Board's confirmation is also required to by-laws made by councils of boroughs, under the Municipal Corporations Acts, for the prevention and

suppression of certain nuisances (Public Health Act, 1875, s. 187). No rules, orders, and regulations can be made under any local or other Act, relating to poorhouses, workhouses, or the relief of the poor, until they have been submitted to and approved and confirmed by the Board (4 & 5 Will. iv. c. 76, s. 22). The Board has power to supervise, alter, amend, confirm, or repeal any by-law made under the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77, s. 35). So, too, with a few exceptions, no by-law made as to markets (10 & 11 Vict. c. 14, s. 42), or as to slaughter-houses (10 & 11 Vict. c. 34, s. 28), or other offensive trades in the metropolis (37 & 38 Vict. c. 67), or as to hackney carriages and public bathing (10 & 11 Vict. c. 89, ss. 68, 69), or under any Tramway Act, will be of any validity until it has been confirmed by the L. G. B. It is very necessary that such by-laws should be submitted to some central authority for revision and confirmation, as local authorities sometimes take strange views as to the extent of their power. For instances of by-laws passed by an urban sanitary authority, and subsequently disallowed by the L. G. B., see BY-LAWS, vol. ii. at p. 315.

#### IV. ADMINISTRATIVE CONTROL.

The administrative control exercised by the L. G. B. over different local authorities varies considerably. In poor law matters its control is complete. The Board has power to create, dissolve, and amalgamate unions, and to regulate the proceedings of the guardians in the minutest particulars. Over municipalities proper the Board has no direct control. It is only when a borough wants to borrow money that the Board can step in and impose conditions. Over sanitary authorities the Board has considerable power, and it can force them to carry out sanitary measures to its satisfaction. It can, by provisional order, alter, amend, or repeal local Acts relating to sanitary authorities. These provisional orders, it is true, require confirmation by Parliament, but that is usually obtained as a matter of course (see PROVISIONAL ORDER). It can also authorise sanitary authorities by provisional order to acquire any necessary land by compulsory purchase. It can in like manner dissolve or alter the boundaries of sanitary districts. It can confer on rural District Councils all or any of the powers of an urban District Council (L. G. Act, 1894, s. 25, subs. (5)). The Board also has special and stringent powers for dealing with epidemics. In such cases it may provide for the speedy interment of the dead, for house-to-house visitation, and all other requisite arrangements; and see 52 & 53 Vict. cc. 64 and 72.

All the powers conferred on the Privy Council by the Diseases Prevention Act, 1855 (18 & 19 Vict. c. 116), and all powers conferred on the Secretary of State under the Sanitary Acts, were transferred in 1871 to the L. G. B. (34 & 35 Vict. c. 70, ss. 2, 7, Schedule, Part II.; and see 21 & 22 Vict. c. 97; 38 & 39 Vict. c. 55, s. 343, Sched. V. Part I.; 46 & 47 Vict. cc. 35, 39). The powers of the Board of Trade under the Metropolis Water Acts, 1852 and 1871, were transferred to the L. G. B. by Schedule V. Part III. of the Public Health Act, 1875.

*Pollution of Streams.*—The L. G. B. has also very important powers under the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75). Sec. 3 of this Act made it an offence, which can be restrained by the summary order of a County Court judge (s. 10), for any person to cause to fall or flow, or knowingly to permit to fall or flow, or to be carried into any stream, any solid or liquid sewage matter. It was feared that this provision would press severely on sanitary authorities, too many of whom

were then and are still in the habit of thus disposing of the sewage of their locality; it was felt that time must be given to such sanitary authorities to find other means of disposing of their sewage, or of rendering the sewage matter harmless. Hence the same section (3) of the Act of 1876 provides that if it appears to the L. G. B., after local inquiry, that further time should be granted to any sanitary authority which was discharging sewage matter into a stream at the date of the passing of the Act, the Board may by order suspend the operation of sec. 3 of the Act for a fixed period, and subject to any conditions they please, so as to protect the sanitary authority from any proceedings which might otherwise be brought against it under that section for polluting the stream.

Moreover, no proceedings can be taken against any person under secs. 4 and 5 of the Act, except by a sanitary authority; and that authority must first obtain the consent of the L. G. B. to its instituting such proceedings. But if a sanitary authority, on application from a person interested, refuse to take proceedings or to apply for the Board's consent to their doing so, the Board may, on the application of that person to them, and after inquiry, direct the sanitary authority to take proceedings.

The L. G. B. is also empowered by sec. 12 to appoint an inspector for the purpose of granting certificates to the effect that the means used for rendering harmless any sewage matter or other pollution falling or flowing into any stream, are the best or only practicable and available means under the circumstances of the case. If such a certificate be given, it is for two years at least conclusive evidence in favour of the person accused of polluting the stream. But any person aggrieved by the granting or withholding of such a certificate may appeal to the L. G. B. The Board has power to confirm, reverse, or modify the inspector's certificate, and also to make an order as to the payment of the costs of the appeal (s. 12). Inspectors of the Board have the same powers for the purposes of inquiries under this Act as they have under the Public Health Act, 1875 (s. 15). And note that the word "stream" is used in this Act to include the sea to such extent, and tidal waters to such point, as the Board may after local inquiry and on sanitary grounds determine by order (s. 20).

*Adulteration.*—Under the Sale of Food and Drugs Acts, 1875 and 1879 (38 & 39 Vict. c. 63, and 42 & 43 Vict. c. 30), and the Margarine Act, 1887 (50 & 51 Vict. c. 39), the L. G. B. has power to compel local authorities to appoint analysts, in case of neglect. The Board has used all its influence to induce the district authorities to take this simple precaution against adulteration. As late as 1891 it appeared that in twenty-two counties, nineteen of our largest towns, and two metropolitan districts, the Sale of Food and Drugs Acts were practically inoperative. Analysts have, however, now been appointed in most, if not all, these places, and with very satisfactory results. The beneficial results of this legislation are shown by the statistics received by the Board since 1877, when the results of the analyses under the Act of 1875 were for the first time tabulated. In that year 1877, 14,706 samples were analysed, and 19·2 per cent. were condemned. In the five years 1877–1881, the proportion reported against was 16·2 per cent. In the next five years (1882–1886) the percentage of adulterated samples fell to 13·9. In 1887–1891 it was 11·7 per cent.; while in the five years 1892–1896 it was reduced to 10·6 per cent. In the two years 1895 and 1896 the proportion of adulterated samples had fallen to a little over 9 per cent. The total number of analyses made during 1896 under these Acts was 45,555, or one to every 636 of the population. See ADULTERATION, vol. i. p. 153.

*Vaccination.*—By sec. 7 of the L. G. B. Act, 1871, and sec. 16 of the Vaccination Act, 1871, the powers and duties which, under the latter Act or any other previous Act dealing with the subject of vaccination, were vested in or imposed on the Poor Law Board or the Privy Council were transferred to the L. G. B., which has power to make special grants to public vaccinators who attain a high standard of efficiency. The Board has taken up the subject of animal vaccination, and now supplies calf lymph to the vaccinators in order to meet the views of those who object to humanised lymph. Of the 889,944 children born in 1894, 626,126 were successfully vaccinated, 89,726 died unvaccinated; the remainder, a little less than 20 per cent., were either “insusceptible,” or had had smallpox, or were not in a fit state of health to be vaccinated.

*Miscellaneous Duties.*—Among the miscellaneous duties of the L. G. B. are the issue of instructions to the Registrar-General’s Office for the registration of births and deaths; the sanction of sales of land by parishes (39 & 40 Vict. c. 62); the working of the Canal Boats Acts, 1877 and 1884 (see CANAL, vol. ii. p. 348), and the Alkali Acts, 1881 and 1892 (see ALKALI WORKS, vol. i. p. 221); and the revocation of sanctions given by local authorities for the use of steam whistles or “hooters” under the Factories (Steam Whistles) Act, 1872 (35 & 36 Vict. c. 61). The Board has also important powers under the Divided Parishes Acts, 1876 to 1882 (see DIVIDED PARISHES ACTS, vol. iv. p. 320); under the Artisans and Labourers Dwellings Acts, 1868 to 1885 (see ARTISANS, vol. i. p. 338); under the Baths and Washhouses Acts, 1846 to 1896 (see BATHS AND WASHHOUSES, vol. ii. p. 35); under the Local Loans Act, 1875, and the Public Works Loans Acts, 1875 to 1883; and under the Union Assessment Acts, 1862 to 1880, and the Valuation of the Metropolis Act, 1869 (see ASSESSMENT COMMITTEE, vol. i. p. 345).

### V. FINANCIAL CONTROL

The L. G. B. controls the financial engagements and the expenditure of local bodies in two ways:—

(a) In most cases, before any local authority can borrow money, it must obtain the sanction of the Board.

(b) The Board subjects the accounts of most local authorities to a searching *audit*.

(a) *Loans.*—Almost all loans for local public works (except piers and harbours) must be sanctioned by the L. G. B., unless they are authorised by special Act of Parliament. Thus the Board sanctions loans for the construction, widening, paving, flagging, and channeling of streets; the erection of offices, public baths and washhouses, bridges, gas-works, markets, hospitals, and sea defences; the provision of pleasure grounds, cemeteries, slaughter-houses, and manure dépôts; and works for the removal of night-soil and for the destruction of refuse. The purposes for which the money is to be borrowed are strictly scrutinised; plans and detailed estimates of the proposed works must be furnished; and, before any loan is sanctioned, the Board must be satisfied that the works are necessary and suitable to the locality, and that the estimates are not excessive. The Board will also see that the money borrowed is properly applied (38 & 39 Vict. c. 89, s. 36). The dates and terms of repayment, the due payment of interest, the issue of debentures, etc., are now regulated mainly by the Local Loans Act, 1875 (38 & 39 Vict. c. 83). And see BORROWING POWERS, vol. ii. p. 218.

• It is unfortunate, however, that the control of the L. G. B.

over such loans is not complete. A local authority can always evade the scrutiny of the Board by applying to Parliament direct; and a private Bill often slips through, without receiving that severe examination which it would encounter at Whitehall. Thus, it appears from the last report of the Local Government Board, dated July 1897, that during the last twenty-five years local bodies have obtained numerous special Acts, under which they have borrowed no less than £71,858,843 without the sanction of the Board. The Board itself has during the same period authorised loans to the extent of £78,647,434, of which apparently only £736,579 is secured by debentures. The rate at which the debt of these local bodies increases is most alarming. At the end of 1875 it was £92,820,100; at the end of 1895 it was £235,335,049. It is highly desirable, therefore, that the borrowing powers of these local authorities should be kept strictly under check by a central authority.

(b) *Audit*.—The L. G. B. is charged with the duty of auditing the accounts of most local authorities. For purposes of audit the country, exclusive of the metropolis, is mapped out into thirty-three districts, under the District Auditors Act, 1879 (42 Vict. c. 6); and the Board appoints officers, called district auditors, who, under its directions, audit on the spot the accounts of poor law guardians, rural sanitary authorities, urban sanitary authorities other than town councils, overseers of the poor, school boards, highway boards, and surveyors of highway parishes. Municipal boroughs and counties are at present exempt from this central audit. An appeal lies from the decision of the district auditor to the Board in respect of any disallowance or surcharge. As a rule, if the defaulting authority has made a *bona fide* mistake, the Board lets it off with a caution; but there is power to surcharge those who directed any illegal or improper payment with the amount of the sum misspent; and occasionally, in the interests of public justice, this power is exercised by the Board (see *GUARDIANS OF THE POOR, Audit*, vol. vi. p. 122). In 1896 the number of disallowances and surcharges reported by the district auditors was no less than 2936. Poor law accounts have for a long time been audited by a central authority; but the extension of such an audit to other local bodies is of recent date. The utility and efficacy of an independent and searching audit is beyond all question; it is the most simple, ready, and self-acting of all expedients for the security of public property.

#### VI. ADVICE.

Every local authority is entitled to the advice of the Board, whenever it is in any difficulty, even though such difficulty be of its own creation. And the local authorities very freely avail themselves of this privilege. The L. G. B. thus guides and superintends innumerable local matters: questions of the most varied character—as to cemeteries and water supply, as to the erection of a hospital, or the misconduct of the master of a workhouse—are constantly referred to Whitehall. It is the duty of the L. G. B. to deal with all these questions, to consider the reports of the various local officers, and to advise the local authorities thereon. Sometimes it is necessary to send down an inspector to hold a local inquiry and report on the matter before the Board gives its opinion (see 4 & 5 Will. IV. c. 76, s. 2; 5 & 6 Vict. c. 57, s. 2; 10 & 11 Vict. c. 109, ss. 20, 21, 22); and for this purpose the Board has attached to it, in addition to the ordinary staff of a Government office, a number of medical men, architects, and engineers, who conduct local investigations of a scientific or technical nature. Its public health and medical department is under the



guidance of three distinguished medical men, assisted by eleven medical inspectors. (The nation has sustained a loss by the recent death of the senior medical inspector, Dr. F. W. Barry.) The value of the information thus acquired, and of the advice thus given by the L. G. B., cannot be exaggerated. It is unfortunate that the Board can so seldom secure that its advice will be accepted and acted on. It is only in extreme cases that the Board proceeds to enforce the law by compelling a defaulting local authority to perform its duty. But the L. G. B. has power to do this by applying to the High Court for a *mandamus*; see, for instance, sec. 299 of the Public Health Act, 1875.

It is also the duty of the L. G. B. from time to time to hold local inquiries into outbreaks of disease (such as the recent epidemic of typhoid fever at Maidstone), and into any other matter affecting the public health in any place (21 & 22 Vict. c. 97, s. 3; 34 & 35 Vict. c. 70, ss. 2 and 7). The Board has power to charge the expenses of these inquiries upon the rates of the locality concerned (Public Health Act, 1875, s. 294). The investigations are conducted by men of high scientific attainments, and the reports they send in not only enable the Board to advise the local authority which has raised the question, but are also of great scientific value. The Board has thus accumulated a mass of experience which has contributed largely towards the solution of many difficult problems of sanitary science. It further has power to direct and pay for special researches into any medical question bearing upon its duties.

Another important, yet little-known, function of the L. G. B. is that of advising the Government on local Acts. It has to report specially on every private Bill that relates to local matters. An enormous number of interests are affected by what is called Private Bill Legislation; and many matters, such as by-laws or powers to borrow money, pass unobserved in private Bills which would be made the subject of active opposition if they were contained in public Bills. It is the duty of the Board to examine these measures, and report specially upon them.

#### VII. RETURNS.

In order that the L. G. B. may be able to offer efficient advice to the various local authorities who may consult it, it is essential that it should have the fullest information. It consequently has conferred on it large powers of demanding reports and returns of every sort and kind from local sources. Every year there is poured into its various departments an immense stream of statistics, which it is the duty of the Board to collate and digest. Annual returns are required, subject to a penalty, to be made to the Board by the clerk to any corporation, justices, commissioners, district or other board, vestry, inspectors, trustees, or other body or persons authorised to levy, or to order to be levied, any compulsory rates, taxes, tolls, or dues. The return must show the amount received, and how it has been expended (23 & 24 Vict. c. 51, s. 1). Any return, which under any previous Act had to be made to any public department, the Board may require to be made to it, under sec. 5 of the same Act. Where, however, the accounts and receipts of a local authority are audited by a district auditor, the local authority is required to submit a financial statement, and the auditor is required to send a duplicate statement, stamped, and certified by him, to the Board; and in that case a return need not be sent under the Local Taxation Returns Acts, unless the Board so require (42 Vict. c. 6, s. 3).

Special provision is made in the Municipal Corporations Act, 1882

## LOCAL TAXATION GRANTS

(45 & 46 Vict. c. 50, s. 28), with regard to returns from municipal corporations, and in the Highway Accounts Returns Act, 1879, with regard to returns of highway boards and surveyors of highways (42 & 43 Vict. c. 39, ss. 2, 3). So that, in fact, the L. G. B. receives annual returns from all the following bodies:—

County authorities.

- Municipal corporations.

- Town councils acting as urban District Councils.

Rural District Councils.

Highway Boards (thirty-five still exist).

Burial Boards, if any still exist.

Commissioners of Baths and Washhouses.

Inspectors under the Lighting and Watching Act (2 & 3 Will. iv. c. 90).

Markets and Fairs Commissioners.

Bridge and Ferry trustees.

Metropolitan Vestries and District Boards.

Commissioners of Sewers.

Drainage, Embankment, and Conservancy Boards.

Churchwardens (church rate accounts).

Conservators of commons.

Harbour, pier, and dock authorities.

Furthermore, the L. G. B. is itself required to lay an annual report of its work before Parliament (10 & 11 Vict. c. 109, s. 13; 34 & 35 Vict. c. 70, s. 2). And a most interesting and instructive blue-book is this Annual Report. It is accompanied by exhaustive returns as to local taxation and expenditure, local loans and debts; for the L. G. B. is required by the Local Taxation Returns Acts, 1860 and 1877 (23 & 24 Vict. c. 51, ss. 1, 6; 40 & 41 Vict. c. 66), to make an abstract of all returns made to it under those Acts, and lay the same before Parliament. As a matter of fact, the Annual Report and its Appendix are by no means confined to matters as to which returns are made to the Board, but deal with every branch of local government, poor law, public health, and the working of all the multitude of statutes to which reference has been already made in this article. The statistics thus collected from over the whole country are most valuable; in some cases, almost alarming. The correspondence which is constantly passing between local officials and the L. G. B. enables the central authority to lay its finger upon the defects of local administration, and its Annual Report furnishes Parliament with the information necessary to enable it to remedy these defects by legislation.

**Local Loans.**—The Local Loans Act, 1875 (38 & 39 Vict. c. 83), authorises certain local authorities to raise loans by debentures, debenture stock, or annuity certificates, for purposes for which they are otherwise authorised to borrow. This subject is more conveniently and more fully treated under PUBLIC WORKS LOANS.

**Local (Scientific and) Investigation.**—See ARBITRATION, vol. i. at pp. 307, 308.

**Local Taxation Grants.**—Up till 1st April 1889 grants were made from the Imperial Exchequer in aid of local rates, with

a view to equalise the incidence of Imperial and local taxation, and to reimburse the local authorities their expenditure on certain matters of national concern. The grant for 1887-88 amounted to £2,615,412. •

Under the Local Government Act, 1888, provision was made for the grant and distribution among the county and borough councils of a portion of the probate duties and of the proceeds of local taxation licences (1868, c. 41, ss. 21, 22). To this was added in 1890 a portion of the customs and excise duties (1890, c. 8, ss. 7, 60), and in 1894 a grant out of the estate duty was substituted for that from the probate duty (1890, c. 30, s. 19).

The amount of the estate duty granted is  $1\frac{1}{2}$  per cent. of the net value of such property, on which the duty is levied, as would have been chargeable with duty on an inland revenue affidavit under sec. 27 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12). It is ascertained by the Commissioners of Inland Revenue in accordance with regulations made by the Treasury (1894, c. 30, s. 19). It is distributed among the counties in England and Wales in proportion to the share certified by the Local Government Board to have been received in the year ending 31st March 1888 out of the grants from the Exchequer in aid of local rates for which it was substituted (1888, c. 41, s. 21). The six counties of South Wales and the Isle of Wight receive an additional sum equal to the amount which the Local Government Board certifies they would have received if certain roads in their districts had been main roads (1888, c. 41, s. 22 (2); see Pulling, *County Authorities Handbook*, p. 242). The same method of distribution is adopted with reference to the local customs and excise duties, which consist of the proceeds of the additional spirit duties of 1890 and a portion of the beer duties equal to 3d. for every thirty-six gallons (1890, c. 8, s. 7). But £300,000 is annually deducted from this grant for purposes of police superannuation (1890, c. 60, ss. 1 (1) (a) 4).

The proceeds of the local taxation licences (which are enumerated in Sched. I to the Act of 1888, and see EXCISE) collected in each county, as certified by the Commissioners of Inland Revenue, are paid to the council of each county (1888, c. 41, s. 20 (1) (2)). The levy of these licence duties can be, but has not been, transferred to the county authorities (s. 20 (3) (4) (5)).

To carry out this purpose the sums devoted to local purposes are collected by the Inland Revenue Department, and paid into a local taxation account at the Bank of England, and paid over from that account to the county authorities. The account is subject to audit by the Auditor-General (1888, c. 41, s. 27), and to Treasury Regulations (see St. R. & O. 1895, p. 404; 1896, p. 154).

The amount of the payments from the local taxation account in 1894-95 was £6,006,876.

County Councils have to keep an "exchequer contribution account," to which are carried the sums received from the local taxation account; and the mode of the application of the proceeds of estate duty and local licences is regulated by ss. 24-27 of the Act of 1888.

The proceeds of local customs and excise duties may be applied as a contribution for the purposes of the Technical Instruction Act, 1889, over and above the amount raised under the Act by local rates (1890, c. 60, s. 1 (2) (3)).

The effect of the sections may be thus summarised—

The sums carried to the account are paid out in the following order—

1. Costs incurred in respect of the account;

## 2. Payments to unions—

(a) For teachers in poor law schools and public vaccinators, the sum certified by the Local Government Board to be equal to the old Exchequer grants.

(b) Fees, if any, paid for pauper children sent from a workhouse to an elementary school.

(c) For registrars of births and deaths, the amount paid by the poor law authorities to them out of the old Exchequer grants.

(d) Four shillings a week for every pauper lunatic maintained in an asylum or place for lunatics.

(e) For union officers, except in the county of London, the amount certified to have been spent in the year ending 25th March 1888 on salaries, remuneration, and superannuation, and on medical appliances and drugs.

## 3. Payments to boroughs—

(a) Four shillings a week for each pauper lunatic chargeable to the borough.

(b) Half the cost of the borough police, if the Home Secretary certifies its efficiency, except in the METROPOLITAN POLICE DISTRICT.

## 4. Payments to local sanitary authorities—

Half the cost of medical officers of health and inspectors of nuisances, if the appointment is in accordance with the rules of the Local Government Board.

## 5. The council applies the balance by transferring—

(a) To the pauper lunatic maintenance account a sum of four shillings a week for each pauper lunatic chargeable to the county.

(b) To the compensation of Quarter Sessions officers' account, the amount of compensation.

(c) To the county police account, half the cost of pay, etc., of the force, if the Secretary of State certifies its efficiency.

The councils of county boroughs rank as counties for this distribution, subject to adjustment of their financial relations with the counties out of which they are carved (1888, c. 41, ss. 32, 34).

In the administrative county of London, the distribution of the grants is regulated by sec. 43 of the Local Government Act 1888.

The application of the grants for each year is shown in the annual Local Taxation Returns (see Parl. Pap. 1897, C. 218).

**Local Taxation Licences.**—See EXCISE; LOCAL TAXATION GRANTS.

**Local Taxation Returns.**—Under a series of statutes, local authorities in England and Wales are required to make annual returns to the Local Government Board of rates, taxes, tolls, and dues other than tolls levied as profits by market companies, or tolls levied under private rights, and of the mode in which the sums levied have been expended (1860, c. 51, ss. 1, 8).

The rates affected are as follows:—

1. Church rates and chapel rates, whether made by the common law or under the Church Building Acts or any other statutes. See RATES (CHURCH).

2. Sewers rate and general sewers rate, and all rates, scots, and taxes levied by Commissioners of Sewers by statute, charter, usage, or custom.

3. Rates under the Lighting and Watching Act, 1833 (3 & 4 Will. IV. c. 90).
4. Rates by commissioners or corporations acting under local Improvement Acts.
5. Rates by vestries or district boards under the Metropolitan Management Acts.
6. Tolls and dues levied by authority of Parliament in respect of markets, bridges, or harbours.
7. Rates levied for the relief of the poor (1860, c. 51, s. 7).
8. Highway rates (1879, c. 39, s. 2).
9. Returns and information required by Parliament from a County Council (1888, c. 41, s. 83 (12)).

Under the Act of 1860 the returns were sent to a Secretary of State, except in the case of poor rates. Now all returns are sent to the Local Government Board (1877, c. 66, s. 1). The accounts must be made up for a financial year ending 25th March, except in the case of the accounts of county and parish councils, and district councils, which are not boroughs, in which the year ends 31st March (1888, c. 41, s. 73; 1894, c. 73, s. 58). If subject to audit, they must be sent in when the audit is complete, or if they are not, within six months of the end of the financial year. Where a financial statement of the authority has been certified by a district auditor, returns are not required unless ordered (1879, c. 6, s. 3; c. 39, s. 2). The person to send in the return is the clerk of the authority bound to make it, or if there is no clerk, the treasurer or officer who keeps the accounts. If he fails to send it in he is liable to a penalty of £20 for each offence, recoverable by action on behalf of the Crown in the High Court (1860, c. 51, ss. 43, 44; 1877, c. 66, ss. 2, 3; 1879, c. 39, s. 2).

When the returns are received, an abstract is made, and must be laid before Parliament (see Parl. Pap. 1897, C. 218).

**Local Venue.**—See VENUE.

**Location.**—See BAILMENTS.

**Locke King's Act.**—See MARSHALLING; MORTGAGE.

**Locke's Act.**—See SOLICITOR.

**Lock-ups.**—Although PRISONS have now all been taken over by the State, local authorities continue to have powers and duties for erecting and maintaining lock-up houses and police cells for the temporary imprisonment of persons accused of crime. Under the County Police Act, 1840 (3 & 4 Vict. c. 88, s. 12), the county justices in General or Quarter Sessions were empowered to provide in such places of the county as they thought fit, station-houses and (or) strong rooms for the temporary confinement of persons taken into custody by the police. Land may be bought and used for the purpose, and the cost of land, buildings, and maintenance, including repayment of borrowed money, falls on the police rate (3 & 4 Vict. c. 88, ss. 12, 13; 19 & 20 Vict. c. 69, ss. 22, 23). Unnecessary stations

can be sold (19 & 20 Vict. c. 69, s. 24). Under the Parish Constables Act, 1842 (5 & 6 Vict. c. 109, s. 22), like powers were given to provide lock-up houses for the temporary confinement of persons taken into custody by any constable and not yet committed for trial, or in execution of any sentence. This was done at the cost of the county rate. In 1848 power was given for combination between counties and boroughs which have a separate commission of the peace, to provide joint lock-up houses in or near the county border, subject to the approval of a Secretary of State (11 & 12 Vict. c. 101; 31 & 32 Vict. c. 22, s. 10); and in 1868 the authority owning a lock-up was authorised to contract to receive prisoners from other jurisdictions (31 & 32 Vict. c. 22, ss. 6-9). The exercise of these powers is subject to the control and approval of a Secretary of State.

Under the Local Government Act, 1888, the functions of county justices were transferred to a standing or joint committee of the justices and the County Council (51 & 52 Vict. c. 41, ss. 3, 4). No express provision is made to divest boroughs, whether they have or have not separate police forces, of the powers given to their corporations by the Act of 1848. See **POLICE**.

These provisions do not apply to the METROPOLITAN POLICE DISTRICT (*q.v.*).

**Locomotives.**—See **LIGHT LOCOMOTIVES**; **EXCISE**.

**Locus standi.**—See **PRIVATE BILL LEGISLATION**; **REFEREES**, **COURT OF**.

**Lodemanage** is the payment made to a pilot for conducting a ship from one place to another. The word was chiefly known in connection with the Trinity House for the Cinque Ports, which was a society of Cinque Ports pilots, or "lodesmen, lootsmen, or leadmen (from a Belgic word 'loot,' which signifies lead), and also called pail lootes, or men who measured the depth of water over shoals in narrow seas by heaving the lead. They conducted ships clear of sandbanks between Dover and the rivers Thames and Medway, and to ports of Flanders, Holland, and the east country" (Lyons, *Cinque Ports*, 1813, 286, 287). They were governed by a master and wardens chosen by themselves, and had a monopoly of the right of pilotage in the Cinque Ports. In view of the society's later history it is worth notice that in 1617 Lord Zouch, the admiral, threatened to merge the society in the Deptford Trinity House because of their oppressive proceedings. In 1634 there was an order of the fellowship of pilots of Dover and Sandwich that no person should pilot vessels out or into the havens of these places unless duly licensed by the fellowship. In 3 George I. the pilots obtained an Act of Parliament by which it was settled to have fifty pilots at Dover, as many at Deal, and twenty in Thanet (Boys, *Sandwich*, 796).

The control and government of this society belonged to the Court of Lodemanage, which is described as a branch of the Cinque Ports Admiralty Court (see **CINQUE PORTS**), and was presided over by the admiral (the lord warden) or his deputy. Its duty was to regulate the fellowship of pilots, and appoint pilots at Dover, Deal, Margate, and Ramsgate, and the seal of Admiralty and Chancery was affixed to its instruments; and its jurisdiction was at first confined, and after many attempts at extension was finally

limited, to regulating the hire payable for piloting ships, the wages of pilots being called lodemanage. In 1689 Commissioners of Lodemanage were appointed, as they were again in 1691, consisting of the lord warden or his deputy, the mayors of Dover and Sandwich, and the captains and lieutenants of Deal, Walmer, and Sandown Castles. A full account of the Court and the society and their proceedings is given in Lyons, *Cinque Ports* (ch. xvi.).

In 1831 the Cinque Ports Salvage Commissioners were appointed, and were empowered to settle and regulate all claims of the pilots for payment for services rendered to ships in the limits of the Cinque Ports (1 & 2 Geo. iv. c. 76); and in 1853 the property of the Court of Lodemanage and the said society of Cinque Ports pilots, with all duties and liabilities in respect thereof, was transferred to the Trinity House, and the pilots put under its control (16 & 17 Vict. c. 129).

[*Authorities.*—Boys, *Sandwich*; Lyons, *Cinque Ports*.]

## **Supplemental Notes.**









































